INDEX.

Caption 1
Argument for Appellee 1
Appendix 117

ALPHABETICAL LIST OF AUTHORITIES CITED.

Ayers vs. McCandless, 147 Pa., 49 (1892) 28
Anheuser-Busch Brewing Assn. vs. Davies County Distilling
American Decisions to Twyne's Case, 1 Smith Lead. Cas. I, 31, 8th Ed. 18
Boarts, Trustee, vs. Selden & Co., October Term (1910) 8-108
Barr vs. Reitz, 53 Pa., 256 (1866) 21
Brawn vs. Kelly, 43 Pa., 104 (1862) 27
Bell vs. McCloskey, 155 Pa., 319 (1893) 24
Babb vs. Clemson, 10 S. & R., 419 (1824) 27
Bucher vs. Com., 103 Pa., 528 86-97
Barlow vs. Fox, 203 Pa., 114 (1902) 26
Boarts, Trustee, vs. Celden & Company, October Term, 1910) 8
Bank vs. Guarantee Title & Trust Co., 178 Fed., 189, (1910) 14
Bryant vs. Swofford, 214 U. S., 279 (1908) 14
Brown vs. Warren, 43 N. H., 430 (1862) 62
Branch of State Bank of Ohio vs. Knopp, 16 Howard, 375 110
Brunswick & Balke Co. vs. Hoover, 95 Pa., 508 (1880) 27
Buckly vs. Duff, 114 Pa., 596 (1886) 27
Bank vs. Jagode, 186 Pa., 556 97-98
Born vs. Shaw, 29 Pa., 288 (1857) 27
Cadbury vs. Nolen, 5 Pa., 320 (1847) 27
Carpenter vs. Mayer, 5 W., 483 (1836) 27
Clow vs. Woods, 5 S. & R., 275 14-18-19-22-29-58
Crawford vs. Davis, 99 Pa., 576 (1882) 22
Cessna vs. Nimick, 113 Pa., 70 (1886) 23
Caulfield vs. Van Brunt, 173 Pa., 428 28-61
Gattle Bros. vs. Kremp, 6 Pa. Super., 514 (1898) 28
Dooly vs. Pease, 180 U. S., 126 (1900) 14
Dewart vs. Clement, 48 Pa., 413 (1864) 27
David vs. Oxenrides, 43 Pa. Super. Ct., 506 (1910) 76
Ditman vs. Raule, 124 Pa., 225 (1889) 27
Exchange Bank of Macon vs. Uhlman-Goldsborough Co., 18 Pa. C. C., 252 (1897) 92
Erdman vs. Mitchel, 207 Pa., 92 (1903) 97
Easton vs. German American Bank, 127 U. S., 532 (1887) 63
Fischer vs. Dohistal, 9 Fed. Rep., 145 (1881) 75
First Nat. Bank vs. Harkness, 42 W. Va., 156, 166; 24 S. E. Rep., 548 (1896) 62
Fry vs. Miller, 45 Pa., 441 (1863) 27
Greenbaum Bros. & Co. vs. Megibben, 73 Ky., 419 (1874) 106
Ghen vs. Rich, 8 Fed., 159 71
Goddard vs. Weil, 165 Pa., 419 25-76
Guillon vs. Earnshaw, 169 Pa., 463 (1895) 73

Gibson vs. Stevens, 8 How. (U. S.), 384 (1850) 76
Goelpke vs. Dubuque, 1 Wallace, 175 (1861) 93
Graham & Mellor vs. McCreary, 40 Pa., 515 (1861) 27
Garretson vs. Hackenberg, 144 Pa., 107 (1891) 24
Hoofsmith vs. Cope, 6 Whart., 53 (1841) 27
Haynes vs. Hunsicker, 26 Pa., 58 (1856) 27
Herron vs. Fry, 2 P. & W., 263 (1830) 27
Hill vs. Leibig Mfg. Co., 3 Pa. Super., 398 (1897) 28
Hower vs. Geesaman, 17 S. & R., 251 (1828) 27
Hughes vs. Robinson, 24 Pa., 9 (1853) 21
Huntingdon vs. Sherman, 80 Conn., 463 (1891) 63
In re Garewich, 115 Fed., 87 (1902) 77
In re Miller Pure Rye Distilling Company, 176 Fed., 606 (1910) 93
Johnson vs. Smith, 11 Humph. (Tenn.), 396 (1850) 62
Jones vs. Harvey, 9 Pa. Super., 326 (1899) 28
Keystone Watchcase Co. vs. Fourth St. Natl. Bank, 194 Pa., 535 (1900) 25
Kingsley vs. White, 57 Vt., 565 (1885) 76
Kessler vs. Velo, 142 Mich., 471 (1905) 105
R. Keil et al. vs. L. H. Harris, 4 Sadler (Pa.), 201 85
Kendig vs. Binkley, 10 Pa. Super. Ct., 463 (1899) 28
Lehr vs. Brodbeck, 192 Pa., 535 (1899) 28
Linton vs. Butz, 7 Pa., 89 (1849) 61
Lewis vs. Dillard, 76 Fed. Rep., 688; 22 C. C. A., 488 (1896) 62
Long vs. Knapp, 54 Pa., 514 (1867) 27
Milne, Brown & Co. vs. Henry, 40 Pa., 352 (1861) 27
McCullough vs. Large, 20 Fed. Rep., 309 39-75
Merchants Nat. Bank vs. Roxbury Distilling Company, 196 196 Fed. R., 76 5
Merchants Nat. Bank of Baltimore vs. Roxbury Distilling Co., Fed. R., 76 2-78
Mfg. Co. vs. Cassell, 201 U. S., 344 (1905) 14
Martin vs. Mathiot, 14 S. & R., 214 (1826) 27
Miller vs. Browarsky, 130 Pa., 372 73-89-92
Mo., Kan. & Tex. Ry. Co. vs. McCann, 174 U. S., 580 109
Moors vs. Jagode, 195 Pa., 163 97-100
Martin vs. Reid., 11 C. B. (N. S.), 730 63
Mercantile Co. vs. Schulz, 56 Wash., 393 (1909) 76
McCready vs. Haslock, 3 Tenn. Ch., 13 (1875) 62
McCullough vs. Wiley, 200 Pa., 172 (1901) 76
McKibben vs. Martin, 64 Pa., 352 15-22
National Union Bank vs. Shearer, 225 Pa., 481 95-97-102
Newcomb, etc., vs. Cabell, 73 Kentucky, 460 (1874) 104
New York, Lake Erie & Western Railroad Co. vs. Pennsylvania, 158 U. S., 431 110
Noble vs. Mitchell, 164 U. S., 367 109
Pattison vs. Dale, 196 Fed., 5 2-4-78
Parks vs. Smith, 94 Pa., 46 (1880) 27
Pearson vs. Carter, 94 Pa., 156 (1880) 27
Peek vs. Heim, 127 Pa., 500 (1889) 27
Pressel vs. Bice, 142 Pa., 263 (1891) 23
Priestly vs. Pratt, L. R., 2 Ex. 99, 102 69
Renninger vs. Spatz, 128 Pa., 524 (1889) 28
Riggs vs. Bair, 213 Pa., 402 (1906) 28
Rosenbaum vs. Batjer, Appellant, 154 Pa., 544 (1893) 91
Shaw vs. Levy, 17 S. & R., 99 (1827) 27
Stephens vs. Gifford, 137 Pa., 219 (1890) 23

Smith vs. Crisman, 91 Pa., 428 (1879) 27
Stadfeld vs. Huntsmann & Co., 92 Pa., 53 (1879) 27
Sloan vs. Johnson, 20 Pa. Super. Ct. Reps., p. 643, (1902) 88
Security Warehousing Co. vs. Hand, 206 U. S., 415, 423 (1907) 77
85-92-94-97-101-102
State Bank vs. Waterhouse, 70 Conn., 76 (1897) 106
Co., 49 S. W. Rep. (Ky.), 541 (1899) 106
Steelwagon vs. Jeffries, 44 Pa., 407 (1863) 27
Taney, Trustee, vs. Penn National Bank of Reading, 187 Fed., 689 2
Thompson vs. Fairbanks, 196 U. S., 516 (1904) 14
Trovillo vs. Shingles, 10 W., 438 (1840) 27
Tibbetts vs. Flanders, 18 N. H., 285 (1846) 62
Tuttle vs. Robinson, 78 Ill. 332 63
Union Trust Company vs. Wilson, 198 U. S., 530, 537, (1904) 42
United States vs. 36 Barrels, 7 Blatch, 459 38-40
United States vs. Witten 40
Worman vs. Kramer, 73 Pa., 385 61
Woods vs. Hull, 81 * Pa., 453 (1875) 61
Weems vs. Delta Moss Co., 33 La. Ann., 973 (1881) 62
Williams vs. Mill, 174 Pa., 299 (1896) 76
Whittle vs. Phelps, 181 Mass., 317 (1902) 76
Whitman vs. Atkinson, 130 Fed. Rep., 759 110
White vs. Gunn, 205 Pa., 229 26-29-73-76
Wilbur vs. Stickland, 1 Rawle, 458 (1829) 27
Witten vs. United States, 143 U. S., 76, (1891) 39
Warehousing Co. vs. Hand, 206 U. S., 415 (1906) 14
Young vs. McClure, 2 W. & S., 147 (1841) 27
Zeiger vs. Pennsylvania Railroad, 158 Fed. Rep., 809 (1908) 94-110
Ziegler & Co. vs. Handrick, 106 Pa., 87 (1884) 27

IN THE

Supreme Court of the United States

No. 115 OCTOBER TERM, 1913.

JOSEPH A. TANEY, Trustee of the Estate of the Miller Pure Rye Distilling Company, Bankrupt, Appellant,

vs.

PENN NATIONAL BANK OF READING, Appellee.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Argument for Appellee.

The facts are not in dispute. The question, as stated in the opinion of the Court of Appeals (R. 33), is "whether the transaction between The Miller Distilling Company and the Bank was a valid and binding pledge of the whiskey in bond as against the Trustee in Bankruptcy of the Miller Distilling Company." The District Court answered the question in the affirmative. The opinion of District Judge McPherson is printed, commencing at page 21 of the record, and is reported in 176 Fed., 606. His judgment was affirmed without dissent by Circuit Judges Gray, Buffington and Lanning

in the Court of Appeals. Their opinion is printed commencing at page 30 of the record and is reported in 187 Fed., 689.

Substantially the same question was later decided in the same way in *Pattison vs. Dale,* 196 Fed., 5, 115 C. C. A. 639, by Circuit Judges Warrington, Knappen and Denison in the Circuit Court of Appeals for the Sixth Circuit.

And substantially the same question was again decided by Morris, D. J., affirming the decision of John Hinkley, Special Master, who wrote an elaborate opinion discussing all the authorities. This case is reported as *Merchants Nat. Bank vs. Roxbury Distilling Company,* 196 Fed. R., 76.

Since the grounds of decision are succinctly stated in the head notes of these cases and the authorities upon which we rely are cited and commented upon in the opinions, we believe that we are saving the time of this Court by printing the head notes and referring the court to the opinions of the Circuit Court of Appeals. We print the opinion of the Court of Appeals for the Sixth Circuit as an appndix to this brief, p. 1.

The following is the syllabus of the decision of the Circuit Court of Appeals for the Third Circuit in *Taney, Trustee, vs. Penn National Bank of Reading,* 187 Fed., 689:

> 1. By the law of Pennsylvania, as established by the decisions of its Supreme Court, retention of possession by the vendor of personal property sold or otherwise transferred is fraudulent in law whenever the subject of transfer is capable of de-

livery, and no honest and fair reason beyond the convenience of the parties can be assigned for the vendor not giving up, and the purchaser, taking possession. But fraud is not imputed where the subject of the sale is not reasonably capable of actual delivery, or where delivery is made in accordance with the usages of the trade or business in which the sale was made.

2. A distilling company's warehouse receipts, calling for whiskey stored in its distillery warehouse, which is in practical effect, under the internal revenue laws, in the custody of the United States, and incapable of delivery by the distiller without payment of the tax, represent the property itself, and their transfer to a purchaser or a pledgee in good faith, together with the gauger's certificates in accordance with the usages of the business, under the law of Pennsylvania operate as a delivery of the whiskey, and, if made more than four months prior to the bankruptcy of the distiller, the sale or pledge is valid as against its trustees.

3. The relation between a distiller and the officers of the government in custody of the whiskey in his distillery warehouse is *sui generis*. It is prescribed by law, and is not contractual, and warehouse receipts issued by the distiller for whiskey so stored in bond are not within Act Pa. Sept. 24, 1866 (1 Purd. Dig. [13th Ed.], p. 393), providing for the negotiability of warehouse receipts, which receipts, under the decisions of the Supreme Court of the State, must have been issued by a third and independent person, in order that their transfer by the bailor to a purchaser or pledgee shall operate as a delivery of the property.

The following is the syllabus of the decision of the Circuit Court of Appeals for the Sixth Circuit in *Pattison vs. Dale,* 196 Fed., 5:

"1. Where distilled liquor is stored in a distillery warehouse under control of the collector of the district and in charge of the internal revenue storekeeper as provided by U. S. Comp. St., 1901, pp. 2122-2124, Secs. 3271-3274, *et seq.,* providing for a joint custody of the warehouse by the distiller and the storekeeper, the distiller's surrender of control does not divest his title nor prevent his dealing with the property subject to the paramount rights of the government."

"2. U. S. Comp. St., 1901, p. 2130, Sec. 3287, provides that, as spirits are received in a distillery warehouse, the gauger or storekeeper must place on the head of each barrel, an engraved stamp signed by the collector or storekeeper and gauger, showing number of proof gallons, name of distiller, date of receipt in the warehouse, and serial numbers of barrels in progressive order, and that no two or more casks or packages warehoused in the same distillery shall be marked with the same number. Held, that where, after spirits had been deposited in a distillery warehouse and properly marked as provided, the distiller pledged a certain number of barrels specifically designated by number, by issuing warehouse receipts, to the pledgee therefor, describing particular barrels by number, number of wine gallons, the date when made, and the number of warehouse stamp, etc., and thereafter became a bankrupt, he thereby effectively created an equitable lien in favor of the pledgee, the validity of which neither he nor his trustees could be heard to deny."

See also *Merchants Nat. Bank of Baltimore vs. Roxbury Distilling Co.*, 196 Fed., R., 76.

These opinions contain such a full discussion of the principles and authorities on which we rely that we refer to the same as our argument.

If this Court, however, desires to pursue this investigation further, we submit the following additional argument on the facts, the principles and the authorities affecting this controversy.

Distillers of whiskey for nearly fifty years have been accustomed to issue warehouse receipts in form similar to those here involved. For many years purchasers from distillers of whiskey stored in their bonded warehouses have treated these receipts, when delivered, as passing title to the goods in bond. Distillers, purchasers and bankers for a long time have used these receipts as collateral. Today in Pennsylvania millions of dollars are invested in whiskey so held; other millions are outstanding on loans, and hundreds of millions in the last fifty years have been exchanged on the faith and credit of such receipts. The importance of the decision of this Court, to those interested as distillers, purchasers and bankers, in these receipts or certificates, can hardly be overstated. If after so many years of use and fancied security, the transaction in this case is held to be ineffectual to pass title, the resulting financial disturbance to and necessary readjustment of the enormous distilling interests in Pennsylvania, Kentucky, Maryland, Illinois and Ohio, would be difficult of estimation.

In the case at bar the whiskey was pledged as collateral for a loan, and the warehouse receipts were delivered to the bank from which the money was borrowed.

Bonded distillery warehouse receipts were issued in the following form:

"No. 5456. 120 bbls.

First District of Pennsylvania,
United States Internal Revenue Distillery.
Bonded Warehouse
of
Miller Pure Rye Distilling Company.
Ryeland, Berks Co., Pa., August 26th, 1907.

Received on Storage from Ourselves
One hundred twenty (120) Barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Subject to our Order and Risk of Loss or Damage by Fire, the Elements, Leakage, Evaporation or Accident. Deliverable only upon Surrender of this Certificate, Payment of Tax and Other Charges due thereon, and Storage at the Rate of Five Cents per Barrel per Month, from August 26th, 1907.

Inspection, Spring 1907.
Stored in Warehouse No. 2.
Serial Numbers of Packages 8159-8278.

MILLER PURE RYE DISTILLING CO.,
S. V. NAGLE,
President.

Address all communications to
Miller Pure Rye Distilling Company,
Philadelphia, Pa.

SPECIAL NOTICE—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

Endorsed:

Miller Pure Rye Distilling Company,
S. V. Nagle,
President.

Valid only when signed by the President or Vice President of the Company."

The gauger's certificates containing the marks, numbers and contents of the barrels accompanied the warehouse receipts and were the Record referred to in the receipts as "Marked and Numbered as per Record Attached." These receipts and certificates for an aggregate of 200 barrels were deposited with the Penn National Bank of Reading as collateral security for a note of the Distilling Company for $2,500. The note contained *inter alia* the provision: "having deposited with the said bank as collateral security for the payment of this and any other past or future indebtedness, liability or liabilities of the undersigned to said the Penn National Bank of Reading or the holders hereof, due or to become due, or that may hereafter be contracted, *the following property, to wit*: 200 *bbls. whiskey in bonded warehouse at Womelsdorf, Pa., as per warehouse rects., gauger's ctf. etc., accompanying, etc.*" The note was not paid at maturity and the Bank at a public sale bought the collateral and claims to be the owner of the whiskey, by its purchase of said warehouse receipts. The Distilling Company having been adjudged bankrupt, the Trustee in Bankruptcy took possession of all of its property, together with said 200 barrels of whiskey stored in the bonded warehouse of said distillery, for which said receipts had been issued.

By petition the Bank prayed for an order on the trustee to delivevr to it the 200 barrels of whiskey. On

reference to the Referee, he refused the prayer. The Court below, McPherson, J., reversed the decision of the Referee and an appeal was taken to the Circuit Court of Appeals, which affirmed the decision of the Court below.

A case involving the same question (*Boarts, Trustee, vs. Selden & Company,* October Term, 1910), had a short time previously been argued in the same Court, and an opinion had been handed down by Judge Archbald, (in which Judge Lanning concurred, and Judge Buffington dissented), deciding this same question the other way. This case was ordered for reargument and was heard at the same time as the case at bar, and the decision theretofore reached was reversed, Judge Gray writing the opinion, and Judges Lanning and Buffington concurring.

The question, therefore, to be decided, is: Was the delivery by the Distilling Company to the Bank of the warehouse receipts in controversy, together with the collateral note, under the laws of Pennsylvania, a valid transfer of the whiskey against the Trustee of the bankrupt Distilling Company?

Counsel respectfully submit the following propositions as determining the question at issue:

I. Under the law of Pennsylvania, considering the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of the trade or business, constructive delivery of the whiskey in controversy was sufficient, actual delivery was unnecessary, and the delivery of the warehouse receipts was a sufficient compliance with the law of Pennsylvania requiring delivery, actual or constructive.

II. The transaction was not fraudulent in fact, and there being no possibility of obtaining a false credit by reason of retained possession, the rule requiring a change of physical possession ceases, and the transaction cannot be held fraudulent in law.

III. Established trade customs, when long continued, and unbroken, bring with them strong presumptions of their legality and validity.

IV. The transaction was not fraudulent in fact, and the whiskey in question not being subject to execution on account of the custody and possession of the government, the trustee's rights are not superior to those of appellee as a *bona fide* holder for value prior to the date of the adjudication in bankruptcy.

V. The Supreme Court of Pennsylvania, the Superior Court, and the Courts of *Nisi Prius* of said state, have construed the Act of 1866 relating to warehouse receipts, and have, without exception, sustained the validity of these bonded distillery warehouse receipts, and have held that receipts of the character and form, and issued under the circumstances of those in controversy here, are warehouse receipts within the meaning of said Act, and pass title by delivery.

VI. The interpretations of a statute of the State of Pennsylvania by the highest courts of that state are binding upon this court, and are accepted by all federal courts as conclusive as to the meaning of the statute, even if, had it been a case of first impression, the federal court might have differently concluded.

Before proceeding with the discussion of the foregoing propositions, it may serve a useful purpose to point out to this Court, that the appellant's brief of argument is chiefly devoted to the consideration of the erroneous assumption that the decision in the Circuit Court of Appeals was founded upon the proposition that these warehouse receipts were technical warehouse receipts, or, stated in other words, receipts issued by a warehouseman or bailee, and appellant's brief accordingly argues that a person may not be his own warehouseman and issue warehouse receipts for his own goods stored in his own warehouse.

As stated, this is a misconception of the opinion of the Circuit Court of Appeals. What the Court decided was, that under the circumstances of this case the goods sold were not reasonably capable of an actual delivery, and that a constructive delivery, therefore, was sufficient; that the whiskey was in the custody of the government's officials; and that "the physical possession was not transferred because it was out of the power of the vendor to transfer the same," and that " a situation is thereby created, as above described, which in our opinion brings both of the cases before us within what we think is the well-settled rule of law in Pennsylvania, permitting under certain circumstances a valid sale of personal property as against creditors to be made in the absence of the physical delivery of the property sold."

And again, said the Court:

"There are many other cases which it would be a work of supererogation to cite. It suffices to say that the law of Pennsylvania in respect of the question we are now considering is settled by a line of cases extending through nearly a century. Starting with the policy of the statute of Elizabeth, for the

circumvention of fraud and deceit in sales of personal property (which nowhere in terms refers to retention of possession by a vendor) it has wisely developed the spirit of that statute and evolved the salutary rule, that where there is nothing in the case but the retention of a physical possession by the vendor, which he is capable of delivering to the vendee, such retention is fraud *per se*, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty. But this rule is not applied by the Courts of Pennsylvania to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor, that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale was made. These exceptions (as they are sometimes called) to the rule, of not divorcing possession from title to personal property, are generally recognized by the courts both in this country and in England; and in Pennsylvania, the line of demarcation between the cases which do or do not fall within the rule, has been laid down by the courts with singular clearness and precision."

And again:

"It is found as a fact in both cases, that the whiskey in question was in such bonded distillery warehouses of the United States, as above described, at the time it was pledged or sold as hereinbefore stated, and under the control and custody of the officers designated by law. That such control was exclusive, is apparent from the provisions of the law as above pointed out, and it seems little less

than absurd to say that the distiller was in possession of this property, when he could have been put in prison if he had attempted to take possession of it. It was property thus situated and circumstanced that the pledgor in the one case intended to pledge and believed that he was pledging, and the vendor in the other intended to sell and believed he was selling, and the legal title to which the pledgee and vendee, respectively, had good reason to believe they had received. It is true, they relied largely upon the transfer of the so-called warehouse receipts, but attached to these receipts were the gauger's certificates, specifying by serial number and brand the particular barrels of whiskey that were the subject of the sale, and nothing required by such a sale or pledge was left undone by vendee or pledgee. At common law, sales of personal property do not require to be documented, though documents, such as bills of sales and warehouse receipts, may be convenient evidence of such a sale.

We think the transactions here under consideration, between the pledgor and pledgee and the vendor and vendee are quite within the spirit and meaning of the rule as to sales of personal property, established by the decisions of the Supreme Court of Pennsylvania."

As a matter of fact, the Circuit Court of Appeals agreed with the contention of the appellant, that these whiskey warehouse receipts were not technical warehouse receipts, for the very reasons given in the brief of the appellant, namely, that a warehouseman cannot issue to himself warehouse receipts for his own goods, stored in his own warehouse, because such a transaction was not a bailment under the law of Pennsylvania.

I.

UNDER THE LAW OF PENNSYLVANIA, CONSIDERING THE CHARACTER OF THE PROPERTY, THE USE TO BE MADE OF IT, THE NATURE AND OBJECT OF THE TRANSACTION, THE POSITION OF THE PARTIES, AND THE USAGES OF THE TRADE OR BUSINESS, CONSTRUCTIVE DELIVERY OF THE WHISKEY IN CONTROVERSY WAS SUFFICIENT, ACTUAL DELIVERY WAS UNNECESSARY, AND THE DELIVERY OF THE WAREHOUSE RECEIPTS WAS A SUFFICIENT COMPLIANCE WITH THE LAW OF PENNSYLVANIA REQUIRING DELIVERY, ACTUAL OR CONSTRUCTIVE.

II.

THE TRANSACTION WAS NOT FRAUDULENT IN FACT, AND THERE BEING NO POSSIBILITY OF OBTAINING A FALSE CREDIT BY REASON OF RETAINED POSSESSION, THE RULE REQUIRING A CHANGE OF PHYSICAL POSSESSION CEASES, AND THE TRANSACTION CANNOT BE HELD FRAUDULENT IN LAW.

The principles bearing on the two propositions, just stated, are somewhat similar and at times so interwoven that it is deemed best to argue them together.

The contract in controversy here is a Pennsylvania contract. The transaction is solely between citizens of Pennsylvania.

The validity of a pledge or contract of sale, or what constitutes delivery under the laws of any state, must be determined by the local law of the state in which the transaction took place.

Lanning, C. J., in *Bank vs. Guarantee Title & Trust Co.*, 178 Fed. 189, (1910), thus states the rule:

> "Whether a conditional contract of sale, chattel mortgage or pledge of personal property is valid as against the general creditors of the vendor, mortgagor, or pledgor, or his trustee in bankruptcy, must be determined by the local laws of the state in which the transaction is had," citing authorities.

See also to the same effect:

Bryant vs. Swofford, 214 U. S., 279 (1908).
Thompson vs. Fairbanks, 196 U. S., 516 (1904).
Mfg. Co. vs. Vassell, 201 U. S., 344 (1905).
Dooly vs. Pease, 180 U. S., 126 (1900).
Warehousing Co. vs. Hand, 206 U. S., 415 (1906).

The Pennsylvania courts hold that where actual delivery is required, it is under the Statute of 13th Elizabeth, ch. 5, Sections 1, 2 and 6 ; Rob. Dig., 295.

Clow vs. Woods, 5 S. & R., 275 (1819)—opinion by Mr. Justice Gibson, is referred to by Judge Sharswood

in *McKibben vs. Martin*, 64 Pa., 352 (1870), in these words:

> "It is unnecessary to trace the decisions in England. *Clow vs. Woods*, 5 S. & R., 275, decided by this court in 1819, is the Magna Charta of our law upon this subject. The principles settled in that case have been recognized and affirmed by a head-roll of subsequent decisions, which it would be a mere affectation of learning to cite. Without adverting to other points, it established that retention of possession was fraud in law wherever the subject of the transfer was capable of delivery and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession."

Note the exception, "and no honest and fair reason could be assigned for not giving up and taking possession."

The reason for the qualification of the rule requiring delivery and for the appearance of an honest and fair reason why the vendor or pledgor should not give up and the vendee or pledgee should not take possession, was given by Judge Gibson in the original case, in these words:

> "The inclination of my mind is, to give the statute a liberal, perhaps an enlarged construction, by putting the rule, requiring a change of possession, on grounds of public policy, and confining its exceptions to those cases, where, from the very nature of the transaction, possession either could not be delivered at all, or, at least without defeating fair and honest objects, intended to be effected by, and which constitute the motive for entering into the contract."

The first section of the Statute of 13th Elizabeth also clearly furnishes the reason for these exceptions as well as the reasons for the establishment of the rule.

> "SECTION 1. For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly practiced in these days than hath been seen or heard of heretofore, which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been, and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors, and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots,, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

It will be observed the purpose of the Statute was to avoid feigned, covinous, and fraudulent conveyances, which were becoming common, and which "have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors," etc., and "to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

With ratiocination, the Pennsylvania courts applied these principles, gradually getting away from the rigor of the rule, as the necessity of the rule became less and less pressing. This was absolutely necessary, if the rule was to be applied otherwise than blindly, and applied in such manner as to prevent fraud, rather than to further it. Let it be remembered that the Statute was by express terms passed to circumvent those who purposed or intended to delay, hinder or defraud creditors.

In this case, as in many others, the courts modified the rule to meet the modified conditions which the progress of civilization made necessary and to keep step with the industrial and commercial development of the times. As the reasons recited in the statute became less and less applicable the strictness of the rule was gradually relaxed as the decisions of the Courts of Pennsylvania both show and state.

Judge Archbald's opinion in this case is based upon a rigid construction of the Statute of Elizabeth, without regard to the real purpose and intent of said Statute, as declared in the decisions of this State, beginning with *Clow vs. Woods,* and extending down to date.

That opinion is a turning backward of the wheels of judicial construction, when the courts of Pennsylvania, and of practically every other State, are rolling those wheels the other way.

Upon the assumption that actual possession of personal property presupposed ownership, and thereby established credit, the rule was founded that upon a sale

of personal property, the retention of possession by the vendor was evidence of fraud. From the very first, however, there were exceptions to this rule thus founded upon such a presumption. In one of the first cases, and the leading case in Pennsylvania—*Clow vs. Woods*—("the Magna Charta of our law on the subject") these exceptions are referred to, and again and again are they found, in case after case, as will be presently shown.

It was said in the note of the *American Decisions to Twyne's* Case, 1 Smith Lead. Cas. 1, 31, 8th Ed.—"The subject of sales and mortgages of chattels without delivery of possession, has given rise in America to more protracted discussion than any other matter, probably, in the law." And again in the same note, page 32, it was said of the reason or want of reason for the rule under modern conditions of trade and commercial evolution:

> "The whole force of the rule is derived from the inducement of a false credit, by a sale entirely unevidenced to the world at large. It of course proceeds upon the two-fold theory, that possession of personalty is the indication of ownership, and that persons are credited upon the faith of such apparent ownership—at least so far as the rule applies to creditors. How far this can be said to be true now, if it ever was entirely true, would seem to be a question of great importance in regulating this rule of policy. Certainly, it cannot be maintained successfully, that in the enormously increased mercantile transactions it is usual or even frequent, for the creditor, before becoming such to take an inventory of the personal property of the would-be debtor. In nine cases out of ten, the credit is given upon the general reputation of the

debtor, and in entire ignorance of his ownership of this horse, or that carriage, or other articles. 'Dun' and 'Bradstreet' are the main dependence. It has also been admitted, from the very earliest cases, that when property is in the possession of a party as bailee, he cannot transfer to any purchaser, or creditor, a title good as against his bailor, although precisely the same deception is practiced in the one case as in the other—it has been said in recognition of this difficulty, that these contracts of bailment are in the usual course of everyday life, and the inconvenience resulting from subjecting goods bailed to the rule in *Twyne's* case would overbalance that caused by making them exceptions. Why, exactly, leaving intent out of the question, the parties should not consult their convenience by leaving the property with the vendor, either as bailee, or for his own convenience, it is difficult to say. The application of the rule is frequently almost robbery. Fair and full value has been paid, and can be reached by the creditor, and yet, although the creditor is in entire ignorance as to whether the article was once owned by or is bailed to the debtor who possesses it, the mere accident, one way or the other, will determine his rights. * * * A recognition of this fact, and of the inapplicability of the rule in its old strictness, has led to a very general relaxation of it, until it is in a fair way to almost entire abandonment in many jurisdictions, though a few still cling to it most tenaciously."

Justice Gibson said in *Clow vs. Woods,* 5 S. & R., 275 (1819):

"Statute 13 Elizabeth does not in words declare conveyance of goods fraudulent where the

vendor retains possession; but in general terms renders void all conveyances made to the end, purpose and intent of defrauding creditors. Hence it becomes incumbent on the courts to determine, from all the circumstances of the case, whether the conveyance be or be not made with a fraudulent intention and in judging of that it is held, that any neglect in leaving the vendor in possession, is fraudulent within the statute. The general rule, is that the possession must be transferred to the purchaser; and to this I propose to examine such exceptions as have been urged."

He then proceeds to examine numerous exceptions. Of the exception where, by the terms of the contract, it appears that possession was not intended to follow immediately, he says:

"I take it to be necessary, not only that retention of possession be part of the contract, but that it also appear to be for a purpose fair, honest and absolutely necessary; or, at least, essentially conducive to some fair object the parties had in view, and which constituted the motive for entering into the contract. It is necessary, not only that appearances should agree with the real state of things, but also, that the real state of things should be honest and consistent with public policy, and that it afford no unnecessary facility to deception."

And again, in the same opinion:

"The inclination of my mind is, to give the statute a liberal, perhaps an enlarged construction, by putting the rule, requiring a change of possession, on grounds of public policy, and confining

its exceptions to those cases, where, from the very nature of the transaction, possession either could not be delivered at all, or, at least, without defeating fair and honest objects, intended to be effected by, and which constituted the motive for entering into the contract."

In the case of *Hughes vs. Robinson*, 24 Pa., 9, (1853), Mr. Justice Lowrie said:

"With very few exceptions, and notwithstanding some rather vigorous expressions in some of the decisions, the administration of justice, in relation to transfers of chattels, has moved steadily on, guided by a few well understood rules. A sale or assignment of chattels is voidable by creditors, unless it be accompanied by such corresponding change of possession as the thing is reasonably capable of; but a reasonable time after the sale is allowed for delivery. * * * If the circumstances of the sale and delivery be in accordance with those that usually and naturally accompany such a transaction, it cannot be declared a legal fraud."

In *Barr vs. Reitz*, 53 Pa., 256, (1866), Mr. Justice Agnew said:

"But in considering the question what is an actual delivery, the nature of the property and circumstances attending the sale must be taken into the account. We are not, in carrying out a mere rule of policy, to confound all distinctions between that which is capable of easy delivery and that which is not. * * * So there are many cases which allow the force of those circumstances which take away any false color or appearance of ownership remaining in the seller."

In the case of *McKibbin vs. Martin,* 64 Pa., 352, (1870), in which Mr. Justice Sharswood reaffirmed the case of *Clow vs. Woods,* and called it the *Magna Charta* of our law upon the subject, it was said:

"Without adverting to other points, it (*Clow vs Woods*) established that retention of possession was fraud in law whereever the subject of the transfer was capable of delivery and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession. • • • But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer."

In *Crawford vs. Davis,* 99 Pa., 576 (1882), Mr. Justice Mercur said:

"The general rule, is that a sale of personal property is not good against the creditors of the vendor, unless possession be delivered by the vendor in accordance with the sale. In determining the kind of possession necessary to be given, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties, is required."

In *Cessna vs. Nimick,* 113 Pa., 70 (1886), the Supreme Court of Pennsylvania said:

"It is now well settled that a change of the location of the property is not in all cases essentially necessary. Due regard must be had to the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property."

In *Stephens vs. Gifford,* 137 Pa., 219 (1890), in an opinion by Mr. Justice Williams, it was said:

"* * * the duty of the purchaser was affected by the nature of the transaction, and that a delivery in accordance with the usages of the trade or business in which the sale was made was a sufficient delivery."

The Justice delivering the opinion thus concludes:

"All these cases recognize the rule, while they qualify it as the circumstances require in order to make its application just. The general rule undoubtedly is that the purchaser of goods must, for the protection of the public, take such possession as is usual and reasonable in view of all the circumstances of his purchase."

In the case of *Pressel vs. Bice,* 142 Pa., 263 (1891), the Supreme Court said:

"The modern doctrine upon this subject appears to be that, in determining the kind of possession necessary to be given, regard must be had, not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property.

> No such change of possession as will defeat the fair and honest object of the parties is required." (Citing cases).

Garretson vs. Hackenberg, 144 Pa., 107 (1891), clearly illustrates the foregoing cases. There the debtor transferred to his creditor all the appliances of a lumbering camp, teams, sleds, harness, tools, chains, etc., and also assigned to the creditor the contract for removing the lumber. The creditor purchaser did not remove the property, retained the debtor—the former owner—in charge as foreman, who continued operations, there being not the slightest evidence of any change of ownership, and the property was accordingly levied upon under a judgment obtained by another creditor. The Supreme Court held that a formal delivery could have been made of all the property purchased, but in view of the character and situation, the use that was to be made of it, etc., no delivery was necessary. Mr. Justice Sterrett, delivering the opinion, said:

> "It is well settled that a change in the location of the property is not always necessary, or even practicable. Due regard must be had to the character of the property, its intended use, the nature of the transaction, the position of the parties, etc."

In the case of *Bell vs. McCloskey,* 155 Pa., 319 (1893), involving the purchase of a lease of a dairy farm, with cattle and farming implements, the vendor being retained in possession and operating the same, there being no ostensible change of ownership, the court held under the circumstances that the purchaser had taken sufficient possession to entitle him to retain it as against the vendor's creditors.

In *Goddard vs. Weil,* 165 Pa., 419 (1894), the present Chief Justice of the Supreme Court said, of the sufficiency of delivery in that case:

> "This is to be determined in view of the relation of the parties, and the nature, use and situation of the property. This rule has been upheld in a long line of cases, among the later of which is *Renninger vs. Spatz,* 128 Pa., 524."

In *Keystone Watchcase Co. vs. Fourth St. Natl. Bank,* 194 Pa., 535 (1900), Mr. Justice Dean said:

> "In the eighty years that have elapsed since the decision of *Clow vs. Woods,* 5 S. & R., 275, the rigor of the rule laid down in that case, and it is the leading one in this state, has been greatly relaxed; nor, considering the progress in population and wealth, and the change in methods of conducting business, could it have been strictly adhered to, without great obstruction to business and hardship to individuals. Under that ruling, the cases were rare, where, as to creditors the ownership of chattels could be in one and the possession in another; in such circumstances, with few exceptions, the transaction was constructively fraudulent as to creditors. But, in the long line of cases following it, step by step, the rule has been so softened, that now, it may be said, with few exceptions, where the purpose of the contracting parties was, as between themselves, an honest one, and there was no concealment as to creditors of its true nature, the contract is not constructively fraudulent; in other words, the law will be slow to hold the parties scamps, constructively, if the contract, in view of its purpose, was actually an honest one."

This was followed by *Barlow vs. Fox*, 203 Pa., 114 (1902), the opinion being delivered by Mr. Justice Fell, who said:

> "When by the action of the parties there has been a separation of the title and possession of personal property, courts will scrutinize the transaction to determine the real intention, and but little regard will be given to the form which it has taken or the name by which it is called. The law is liberal in not requiring an actual change of possession when it will defeat the lawful purpose of the parties."

In a late case, that of *White vs. Gunn*, 205 Pa., 229 (1903), it was said by Mr. Justice Brown:

> "What, however, would be a sufficient delivery of possession and retention of it in one case might not be in another; and in saying that the rigor of the rule requiring the purchaser to take and keep possession of property purchased by him has been relaxed, nothing more was meant than that the law does not have or set up an unbending test of the sufficiency of delivery and retention of possession to be applied to all cases, but that, in passing upon the sufficiency of possession taken by the purchaser in any particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of the trade or business."

Other cases upon the same subject, in which the same rules and principles have been discussed or ap-

plied, but without any distinguishing or additional features, are the following:

Babb vs. Clemson, 10 S. & R., 419 (1824).
Martin vs. Mathiot, 14 S. & R., 214 (1826).
Hower vs. Geesaman, 17 S. & R., 251 (1828).
Shaw vs. Levy, 17 S. & R., 99 (1827).
Wilbur vs. Strickland, 1 Rawle, 458 (1829).
Herron vs. Fry, 2 P. & W., 263 (1830).
Carpenter vs. Mayer, 5 W., 483 (1836).
Trovillo vs. Shingles, 10 W., 438 (1840).
Hoofsmith vs. Cope, 6 Whart., 53 (1841).
Young vs. McClure, 2 W. & S., 147 (1841).
Cadbury vs. Nolen, 5 Pa., 320 (1847).
Haynes vs. Hunsicker, 26 Pa., 58 (1856).
Born vs. Shaw, 29 Pa., 288 (1857).
Milne, Brown & Co. vs. Henry, 40 Pa., 352 (1861).
Graham & Mellor vs. McCreary, 40 Pa., 515 (1861).
Brawn vs. Kelly 43 Pa., 104 (1862).
Steelwagon vs. Jeffries, 44 Pa., 407 (1863).
Fry vs. Miller, 45 Pa., 441 (1863).
Dewart vs. Clement, 48 Pa., 413 (1864).
Long vs. Knapp, 54 Pa., 514 (1867).
Smith vs. Crisman, 91 Pa., 428 (1879).
Stadfeld vs. Huntsmann & Co., 92 Pa., 53 (1879).
Parks vs. Smith, 94 Pa., 46 (1880).
Pearson vs. Carter, 94 Pa., 156 (1880).
Brunswick & Balke Co. vs. Hoover, 95 Pa., 508 (1880).
Ziegler & Co. vs. Handrick, 106 Pa., 87 (1884).
Buckly vs. Duff, 114 Pa., 596 (1886).
Ditman vs. Raule, 124 Pa., 225 (1889).
Peek vs. Heim, 127 Pa., 500 (1889).

Renninger vs. Spatz, 128 Pa., 524 (1889).
Ayers vs. McCandless, 147 Pa., 49 (1892).
Caulfield vs. Van Brunt, 173 Pa., 428 (1896).
Lehr vs. Brodbeck, 192 Pa., 535 (1899).
Riggs vs. Bair, 213 Pa., 402 (1906).
Hill vs. Leibig Mfg. Co., 3 Pa. Super. 398 (1897).
Gattle Bros. vs. Kremp, 6 Pa. Super., 514 (1898).
Jones vs. Harvey, 9 Pa. Super., 326 (1899).
Kendig vs. Binkley, 10 Pa. Super. Ct., 463 (1899).

The common law prior to the Statute of Elizabeth, the Statute of Elizabeth, and the decisions in Pennsylvania construing both the common law and the statute, show:

That the requirement of the delivery of possession was to avoid fraud, because the retention of possession was, as a rule, inconsistent with the sale of the property. Such possession gave a false credit to the vendor, and therefore fraud was presumed, notwithstanding there was no dishonest intent, unless the retention of such possession was satisfactorily accounted for. In other words, where the property was susceptible of delivery, and there was no good reason why such delivery should not have been made, the failure to deliver amounted to a constructive fraud. But from the very beginning of the rule to the present date, there never was a time in the State of Pennsylvania, where the goods sold or pledged could not be retained by the vendor, or pledgor, if there was a satisfactory explanation to account for the non-delivery; as, for example, if there was a bailment, if the goods were in process of

manufacture, if the goods were so bulky that they were incapable of actual delivery, if the goods were in a warehouse, and many other exceptions that could be picked out of the cases. In fact, *Clow vs. Woods,* the Magna Charta of our law upon the subject, makes room for the exceptions in the broadest possible terms, when Mr. Justice Gibson says:

> "I take it to be necessary, not only that retention of possession be part of the contract, but that it also appear to be for a purpose fair, honest and absolutely necessary; or, at least, essentially conducive to some fair object the parties had in view, and which constituted the motive for entering into the contract."

Passing by all the intermediate cases and coming down to the last authoritive statement on the subject by the present Supreme Court, we have the same principle re-stated in the words of Mr. Justice Brown, in *White vs. Gunn, supra*:

> "In passing upon the sufficiency of possession taken by the purchaser in any particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of the trade or business."

Assuming, then, that the established law of Pennsylvania is the rule laid down by *White vs. Gunn, supra*: that no unbending test of the sufficiency of delivery and retention of possession can be applied to all cases; that in passing upon the sufficiency of possession taken by the purchaser in any particular case there must be taken into consideration: (a) the character of

the property; (b) the use to be made of it; (c) the nature and object of the transaction; (d) the position of the parties; and (e) the usages of trade or business: let us apply the rule to the facts.

(A) The character of the property, and (B) the use to be made of it.

Whiskey in a bonded warehouse, which is the subject of the controversy here, is really goods in process of manufacture. It still requires aging and treatment by the distiller under a uniform and special temperature, under the direction and care of the distiller. During this process, as well as that of manufacture in certain stages, the property is under the supervision and control of an officer of the United States government. New whiskey is unmarketable. It is unfit for use. Every distiller has his own processes for aging. It can not be aged under the direction of the distiller except in the bonded warehouse. It must be placed in such warehouse when drawn from the still under the U. S. government regulations. The whiskey, therefore, is in process of manufacture for the period during which it is stored in the bonded warehouse. The U. S. government regulations and the acts of Congress recognize the necessity for thus completing the whiskey by this aging process. Whiskey can not be bottled in bond until after it has been "aged" for at least four years (Sec. 2, Act March 3, 1897, 29 Statutes at Large, 627; Sec. 50, Act Aug. 27, 1894, 28 Stat. at Large, 564). There is thus a continuing process of manufacture during the storage of the whiskey in the bonded warehouse varying in point of time but extending over years.

The general rule of the common law, that a man cannot be his own warehouseman, storing goods with himself, issuing warehouse receipts to himself, and then utter such warehouse receipts and give them currency, is not applicable to the facts of the bonded warehouses of distilleries. While it is true that the distiller owns the building and the land of the warehouse, and that he has a certain joint custody with the revenue officers; nevertheless the fact remains that the actual power of physical control and custody of the goods stored in the warehouse, is in the United States Government. This custody is retained and the control is held by locks and keys, exclusively in the hands of the representatives of the Government; and the distiller can have no more access to the goods stored in such warehouse, can no more reach them or tamper with them, remove them, or in any manner interfere with them, than if such distillery warehouse was owned, controlled, and entirely in the possession of the Government.

The Internal Revenue Acts of the United States, (Sections, 3267 to 3276, 3287 to 3288, 3293, 3293a, 3301 to 3303 of the Revised Statutes) and the Internal Revenue Regulations, (pages 45 and 70), provide for the warehouse in controversy here and for the custody and control thereof by the government employes. The receiving cisterns and the room in which the same are placed, are in charge and under the lock and seal of the internal revenue gauger, designated for that duty. The locks and seals are provided by the government, and the key is in charge of the collector and such gauger as the collector may designate. When the spirits are drawn off into casks from the cistern, it must be under the supervision of the gauger and in the presence of the storekeeper, and they must be removed

directly to the distillery warehouse. Minute and detailed provisions are made with reference to the details of the still, the locks or seals, the going into the cistern room or building in the absence of the revenue officers, etc.

It will be observed that these provisions affect the whiskey prior to its reaching the distillery warehouse.

The Acts provide that every distiller shall provide at his own expense a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture, until the tax thereon shall have been paid, but no dwelling house shall be used for such purpose, and no door, window, or other opening, shall be made or permitted in the walls of such warehouse, leading into the distillery or into any other room or building, and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is declared to be "a bonded warehouse of the United States," to be known as "a distillery warehouse," and shall be under the direction and control of the Collector of the District and in charge of an internal revenue storekeeper assigned thereto by the Commissioner. The Commissioner, whenever in his opinion the warehouse is unsafe or unfit for use, or the merchandise therein is for any reason liable to loss or great wastage, may discontinue the warehouse and require the merchandise to be removed to some other warehouse; the transfer to be under the supervision of the Collector, or of such officer as he may designate, the expense, however, to be paid by the owner of the merchandise. If the removal is not made as ordered by the Commissioner, the merchandise may be seized and sold as goods are sold for taxes. The

storekeepers have charge, under the direction of a Collector, of the distillery warehouse. The distillery warehouse shall be in the joint custody of the storekeeper and the proprietor, but it shall be kept locked and shall at no time be unlocked or opened or remain open unless in the presence of the storekeeper, or other person who may be designated to act for him, and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the Collector having control of the warehouse. No fence or wall higher than five feet shall be maintained around the distillery so as to prevent easy access, and the distiller shall furnish to the Collector as many keys of the gates and doors as the Collector may require for any of his employes who may be authorized to make survey or inspection of the premises, or the contents, and the distillery shall be kept always accessible to such officers. The revenue officers at all times, as well by night as by day, shall have the right to enter any distillery building or place used for the business of distilling, or used in connection therewith for storage or other purposes, and to examine, gauge, measure, and take an account of everything therein.

Penalties are provided for the obstruction or molestation of the revenue officers in the performance of their duty, and the officers are given the right, by day or night, to break open by force any of the doors or windows, or break through any of the walls to enable them to enter the warehouse or distillery.

The Acts also provide that the distilled spirits shall be drawn from the receiving cisterns into casks or packages and shall thereupon be gauged, proved, and marked, by the internal revenue gauger, who shall cut on the

cask or package the quantity of the contents of such cask or package, and the name of the spirits, as known to the trade, and the spirits shall be immediately removed into the distillery warehouse when thus marked, and the gauger shall, in the presence of the storekeeper of the warehouse, place a stamp on the head of the package, which shall be signed by the Collector, by the storekeeper and by the gauger, and shall have written thereon the number of gallons, the name of the distillery, the date of receipt in the warehouse, and the serial number of each package, as the same are received from the distillery, and no two or more packages warehoused at the same distillery shall be marked with the same number. After the tax has been paid, no such spirits shall be stored or allowed to remain in the warehouse or on the premises. The gauger shall, under regulations of the Commissioner, make a daily return to the Collector, giving a true account in detail of all articles gauged or inspected and for whom, and the number and kinds of stamps used. The distiller shall on the first day of each month, or within five days thereafter, enter for deposit in such warehouse, under the regulations prescribed by the Commissioner of Internal Revenue, all spirits stored in such distillery warehouse, and the entries shall be in duplicate and contain the name of the person making the entry, the designation of the warehouse, the date, etc. It shall specify the kind of spirits, the number of packages, the marks and serial numbers, the number of gallons, the amount of tax on the spirits contained in the packages; all of which shall be verified by oath. And the distiller shall give bond in duplicate, with sureties, to pay the tax; the tax to be paid at the time when same are withdrawn from the warehouse and within eight years from the date of the entry.

Every storekeeper, (the employee of the government), must keep a warehouse book, containing a complete record, and also a book showing the materials brought into the distillery, and such storekeeper must deliver a report to the Collector having control of the warehouse, to be recorded and filed in the office of the Collector, and transmit a copy thereof to the Commissioner of Internal Revenue.

The Internal Revenue Regulations provide that storekeepers are required to be on duty and in daily attendance at the warehouse at which they are respectively assigned, until relieved, whether by day or night, and the storekeeper assigned to any distillery warehouse, has charge, by the express provisions of the law, both of the warehouse and the distillery, under the direction of the Collector, and gaugers, storekeepers, and storekeeper gaugers, are strictly prohibited from entrusting locks, keys or seals in their charge to any person other than an internal revenue officer entitled to receive the same.

The Revised Statutes in all of these provisions, and everywhere, in discussing these distilleries and warehouses, refer to the warehouse as "distillery warehouse," "special bonded warehouse," and "bonded warehouse."

Penalties by fine and imprisonment are enacted for the violation of these acts, rules and regulations.

It will be observed that by section 3271 of the Revised Statutes, it is provided that such a warehouse,

> "Is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and

control of the Collector of the district ,and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner."

And under section 3274 it is provided:

"Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept securely locked, and shall at no time be unlocked, or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse, except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse."

The statutes, therefore, clearly draw the distinction between the *joint custody* of the storekeeper and the proprietor, and the *exclusive control* of the collector of the district through the internal revenue storekeeper. The joint custody of the proprietor or distiller, gives him no control whatever over the goods stored, and he can neither place any goods in the warehouse nor take any goods out of the warehouse.

It would tax the ingenuity of any man to devise a system whereby goods thus stored in the distillery warehouse could be more completely removed from any power or disposition or control by the distiller, than are provided by these enactments and regulations.

Now, what was the purpose of it all? Why this provision for distillery warehouses? Why these minute regulations thereof? Why this permission, without pay-

ment of tax, to retain whiskey on storage for a period of eight years? The whiskey is measured, gauged, put into packages, marked and stamped when drawn from the cistern, before it is placed in the warehouse, or rather at the time when it is so placed. This elaborate system was adopted and approved by the government, because of the nature of the business as developed by the custom and usage of the trade. Whiskey when first distilled is not ready to go into consumption. It requires aging. The older it gets the more valuable it becomes. To be aged properly, certain requirements of temperature, etc., are necessary. To provide for the guarantee of genuineness and to avoid adulteration, it was found desirable to have the whiskey retained in the distillery under the control and custody of the government officers. The government practically guarantees, by its marks, gauges, etc., the genuineness of the goods, their age, and their freedom from adulteration. The government tax, as a rule, is several times the value of the whiskey. To have compelled the payment of this tax immediately upon the manufacture of the spirits, and to have compelled the distiller thus not only to advance this money, but also the cost of production, and to wait for repayment for years, pending the period when the goods would be marketable, was found to be undesirable, unfair, and to accomplish no good or useful purpose. Besides this, by paying the tax and removing the goods the distiller, purchaser or pledgee would lose the outage both on the price of the whiskey and the tax of $1.10 per gallon paid on it, which amounts, as will be hereinafter shown, to from 25% to 40% of the price of the whiskey.

So, too, it was found impracticable, as a business proposition, for the distiller to manufacture the whiskey, store it in the distillery warehouse, and carry it at

his own cost and expense, until the same should become marketable. This would involve enormous outlays of capital. Accordingly the custom grew up of issuing warehouse receipts, having attached thereto the certificate of the revenue officers showing the serial numbers of the packages, the number of gallons, the date of inspection, etc. The warehouse receipt certified that the number of barrels specified were to be delivered to the order of the purchaser, upon return of the warehouse receipt, and the payment of the tax and charges due; they also provided for the payment of storage, at so much per barrel per month, with provision that loss, by fire, the elements, leakage, evaporation, or unavoidable accident, was at the purchaser's risk. The whiskey could not be withdrawn without the consent of the revenue officers, and by their direction, until the payment of the government tax, and under the terms of the receipt could not be withdrawn without the payment of the storage charges, and return of the reecipt.

These were the purposes of the creation of these United States bonded distillery warehouses, and the reasons for their creation, and the reason and purpose for issuing the warehouse reecipts.

It is not necessary to assume, as was required in the opinion of Judge Archbald, that the revenue regulations constituted the government a bailee of the whiskey stored in such warehouse. A bailment is not the only condition in Pennsylvania which will excuse actual delivery and permit of constructive delivery. Much less will suffice to mitigate the rigor of the rule requiring actual delivery. *United States vs. 36 Barrels,* 7 Blatch., 459, (1870) holds:

> "All that the statute has done is, to throw around his ownership, possession, custody and con-

trol (the distiller's), a surveillance, and a joint custody of the warehouse, as an obstacle to the accomplishment of any fraud the owner may intend and desire to effect."

This is amply sufficient for our contention.

So, too, in *Witten vs. United States*, 143 U. S., 76, (1891) where the distiller had been held liable for the tax, notwithstanding the spirits had been stolen, it was held:

> "The warehouse was provided by the owner of the distillery, at his own expense and on his own premises, and, although declared to be a bonded warehouse of the United States, and required to be under the direction and control of the collector of the district and in charge of the government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits, instead of paying the tax at once. The government assumed no responsibility to him for their safekeeping."

This in no manner militates against our position. It recognizes a joint custody.

The decision of Judge Bradley and Judge Acheson in *McCullough vs. Large*, 20 Fed. Rep., 309, (1884) emphasizes our contention; namely, that for some purpose, the government had the control and a joint possession of the whiskey stored in the warehouse. The Court said:

> "The whiskey in question was virtually in the possession of the United States, held for internal revenue taxes—and the sheriff could not rightfully disturb that possession."

An examination of the opinion in both *United States vs. Witten* and *United States vs. 36 Barrels*, shows that the inquiry was limited to the relation of the distiller to the government, and not to the relation of the government, by reason of its joint custody and its control, to third parties. Thus, in the former case the court held that: "the only duty which the revenue officers owed in regard to the security of the warehouse and the safekeeping of the spirits therein, was to the government, and not to the defendants." And in the latter case the court says:

> "The inquiry into the possession or custody or control is in any case immaterial for any purpose, except as the means of identifying the person whose fraudulent intent or design is the cause of forfeiture."

In the first opinion of Judge Lanning, concurring with Judge Archibald, he says:

> "While section 3271 of the Revised Statutes declares that 'a distillery warehouse shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper assigned thereto by the commissioner,' and section 3274 declares that 'every such distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof,' just as it declares of general bonded warehouses in section 51 of the Act of August 27, 1894, and while there are cases which speak of the possession of the government when considering the attempt of a sheriff to levy on the spirits therein stored, the true relation of the government to spirits stored either in a distillery warehouse or in a general bonded warehouse is, I

think, rather that of a policeman to prevent removal of the spirits before payment of the government tax than that of a bailee."

This was before the reargument and reversal. But to this holding counsel make no objection. As previously stated, a technical bailment is not necessary. So long as there was a policeman on guard, acting for the government, and not for the distiller, holding his mace aloft to prevent any interference by the distiller or anyone else, with the control of the government until the tax should be paid, that would excuse actual delivery by the distiller.

Under the express terms of the statute, and under all the decisions, and every one of them, there can be no question of the fact that the revenue officers of the government in a distillery warehouse have a joint custody with the proprietor, and so long as the tax is unpaid, the exclusive control and physical possession of the goods stored therein; and this, whether you consider such officers as storekeepers, policemen, or by any other name as sweet, and whether they are bailees or not. The physical possession by the government retained for a lawful purpose excuses the delivery in specie of the goods, there being a reasonable, fair and honest explanation of the whole transaction.

As a matter of fact, the joint custody of the distiller with the government, of which some of the cases speak. arises from the provisions of the Revivsed Statutes which permits the distiller, in the presence of and with the representatives of the Government—the revenue officers—to have access to the whiskey for certain purposes, that is, to care for and look after the same; the

distiller having no right whatever to remove the goods, under the severest fines and penalties; nor to obtain access thereto, except with the consent and in the presence of the officers of the Governmnt.

These minutes rules, regulations and provisions of the statute to all intents and purposes make a bonded distillery warehouse as much a place beyond the actual power of control of the distiller, as to taking possession of the goods, disposing of the same, transferring physical possession, or any other exercise of physical manipulation, as if such warehouse were owned wholly and solely by the United States Government.

Judge Archbald's conclusion that the storekeeper is not in possession of the barrels of whiskey in a bonded warehouse was reached after a consideration of the Revised Statutes. We think that the opposite conclusion is required. Possession is not a theory but a fact involving two elements, one physical and the other mental. The Romans described them by the terms *corpus* and *animus*. In *Union Trust Company vs. Wilson*, 198 U. S., 530, 537, (1904), Mr. Justice Holmes said:

> "When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense. *Gough vs. Everard*, 2 H. & C., 1, 8; *Ancona vs. Rogers*, 1 Ex. Div., 285."

Judge Buffington quotes from Judge McPherson's opinion in the Miller case as follows:

> "The warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete

and practically exclusive. A lock is put on by the government, and the key is in the storekeeper's possession. The warehouse must not be unlocked or opened or remain open except in the presence of the storekeeper or his lawfully designated representative, and no articles may be received or taken out except by the collector's order addressed to the storekeeper. Id. 21, 24. Any revenue officer at any time of the day or night may enter the building to examine, gauge, measure and take account of the spirits. Heavy penalties are denounced if his attempt to enter is obstructed by the distiller. Immediately upon distillation, the spirits must be placed in the warehouse. Careful regulations provide what kind of packages may be used and regulate their brands and stamps."

Judge Buffington adds:

"To hold, in the face of the physical facts of a government storekeeper, and government lock and keys provided by federal statutes, that the whiskey is in possession of the distiller because the distiller owns the bonded warehouse is equivalent to telling a man he is at liberty because the room in which he is locked is in a house he owns. Indeed, it seems to me the distiller can not be said to be in possession of his property when he could be put in prison for attempting to take possession of it."

Judge Archbald reached the conclusion that the distiller and not the storekeeper was in possession of the whiskey at the time of sale, principally because the custody of the government was assumed for the special purpose of ensuring the collection of the taxes, and would terminate when that purpose was accomplished. But

the fact that the government storekeeper is put into the relation which he occupies to the whiskey (whatever that relation may be), for the special purpose of protecting the revenue, and the fact that the distiller may terminate that relationship at any time by payment of the taxes does not assist in determining what that relationship is while it exists. The storekeeper occupied a certain relationship to the barrels of whiskey when the sales were made. Was it possession at that time, or was it not? It is immaterial that the relation might at some time thereafter be terminated. A learned writer in defining the elements of actual possession says:

> "The will and power required are only such as are sufficient for the present. * * * So the possessor may have a mind to surrender his possession very soon, as in the case of the finder who knows the owner of the article and is actually on his way to restore it to him, and yet have complete present possession." *Terry, Principles of Anglo-American Law,* Sec. 280.

Judge Lanning, in his first opinion, held that the storekeeper was not in possession, but that the "true relation is, I think, rather that of a policeman to prevent removal of the spirits before payment of the government taxes." But such "a policeman" may certainly be in possession of the goods, the removal of which he is appointed to prevent. The purpose of his appointment does not necessarily determine the fact whether he is in possession or not. The provision of Sec. 3274 that "every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof" furnishes no *indicia* of the relation of either party to the barrels of whiskey. That must be determined by other provisions of the statutes. A person may have joint or

sole custody of a house and yet be excluded in fact or by a rule of law from the possession of chattels in the house. Nor is the fact, also relied on by Judge Archbald, that "the arrangement is primarily for the convenience of the distiller" material. The question is not, when or why the government takes charge of the goods, or how the relationship can be terminated, but what the relationship was while it existed, and at the time when the sales in this case were made.

This discussion is well summed up in this case by Judge Gray, delivering the opinion of the court (Record, pp. 37-41), as follows:

> "The following facts seem to be clearly established by the records before us:
>
> The whiskey was not so in the physical possession of the Distilling Company, as to render possible a delivery at the time that the pledge was made in the one case and the sale in the other, consistent with the avowed and fair purpose of the transaction. The facts in support of this proposition must be examined with some care, as the contrary has been contended with much force and ability.
>
> The excise tax on whiskey is one of the most fruitful sources of revenue possessed by the Federal Government, and the Internal Revenue laws and the Treasury regulations made in pursuance therefor, provide for and safeguard its collection with the most scrutinizing care and particularity. It is well known that a marketable product is not the result of mere distillation of the liquor from grain or fruit. In fact, its change into such a product may be said to be hardly begun when it makes its appearance in the tank or cooling vats. It requires

to be skillfully cared for and ripened, and for the ripening process it is necessary that the whiskey should be stored in wood for several years. The tax on whiskey is remarkable and distinguished from other excise taxes, by the fact that it is in amount many times the cost of the whiskey itself, the tax of $1.25 a gallon being about five times the ordinary value of the whiskey at the still. It is manifest that this extraordinary tax could not be collected on the whiskey as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before he was called upon to pay the tax. As this involved quite a number of years, the government, for the convenience of the distiller, as well as for the protection of its own revenue, has provided by law for the custody and control of the whiskey from the time it leaves the still until, being properly aged, it has become marketable, or until it is convenient for the distiller or owner to pay the tax thereon and withdraw the same from such custody. Where the amount of the tax is so much out of proportion to the value of the whiskey, a great temptation is presented to evade the payment of the same. To guard against this, the government, by most carefully framed provisions of law and regulation, takes charge of the liquor from the time it issues from the still until it is withdrawn from its custody by the distiller or owner, upon payment of

the tax. These provisions of law are most minute and occupy many sections of the Revised Statutes.

Of these it may be well to recite in full the following:

> 'Sec. 3271. Every distiller shall provide, at his own expense, a warehouse, to be situated on, and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid; but no dwelling house shall be used for such purpose, and no door, window, or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the Collector, is hereby declared to be a bonded warehouse of the United States to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner.
>
> * * * * * * *
>
> 'Sec. 3273. The storekeeper assigned to any distillery warehouse shall also have charge of the distillery connected therewith; and every storekeeper shall have charge of the warehouse to which he is assigned, and of such distillery, under the direction of the collector controlling the same.
>
> 'Sec. 3274. Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept

> securely locked, and shall at no time be unlocked or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designaed to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse.'

Whenever in the opinion of the Commissioner of Internal Revenue, such distillery warehouse is unsafe or unfit for use, he may discontinue such warehouse and require the merchandise therein to be transferred to such other warehouse as he may designate. Such transfer shall be made under the supervision of the Collector, or such officer as may be designated by the Commissioner, and the expense thereof shall be paid by the owner of the merchandise. (Sec. 3272). In this warehouse, spirits may remain for eight years, and they may be bottled after four years, but not before, and may be withdrawn at any time, upon the payment of the tax and charges. (Act of August 27th, 1894). As said by the learned judge (McPherson) of the court below, the warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive. The lock is put on by the government and the key is in the storekeeper's possession. The warehouse must not be unlocked or opened, or remain open, except in the presence of the storekeeper or his lawfully designated representative, and no articles may be received or taken out, except by the Collector's order, addressed to the storekeeper. (Sec. 3274). Revenue officers may, at

any hour of the day or night, enter the building to examine, gauge, measure and take account of the spirits. (Sec. 3276). Immediately upon distillation, the spirits must be placed in a warehouse in casks or packages, as provided by law, and shall thereupon be gauged, proved and marked by an Internal Revenue Gauger, who shall cut on the cask or package containing such spirits, in a manner prescribed by the Commissioner, the quantity in wine gallons and in proof gallons of the contents of such casks or packages. The same shall be cut on the head of such cask, 'and the Gauger shall, in the presence of the storekeeper of the warehouse, place upon the head of the cask or package an engraved stamp, which shall be signed by the Collector of the District and the storekeeper and gauger.' Written upon the stamp must be the number of proof gallons, the name of the distiller, date of receipt in the warehouse and the serial number of each cask or package. This stamp must be signed by the United States Storekeeper and by the United States Gauger. (Sec. 3287). As a matter either of regulation or of practice, a gauger's voucher or certificate containing these particulars is delivered to the distiller. In the last of the cases at bar, the Master finds that the United States Gauger gave the paper certifying to the receipt, inspection, gauging and marking of the barrels of whiskey in question, and he finds in addition that there is a blank space left in this document in which may be noted withdrawals of the whiskey. The same is true also as to the certificates in the first case. It was stated without contradiction in the course of the testimony, at the trial in the latter case, that without conspiracy with the gauger, these receipts could not be duplicated.

There are heavy penalties for removing spirits from the warehouse, except as provided by law, and these penalties may be inflicted, although no intent to defraud may exist.

It is found as a fact in both cases, that the whiskey in question was in such bonded distillery warehouse of the United States, as above described, at the time it was pledged or sold as hereinbefore stated, and under the control and custody of the officers designated by law. That such control was exclusive, is apparent from the provisions of the law as above pointed out,—and it seems little less than absurd to say that the distiller was in possession of this property, when he could have been put in prison if he had attempted to take possession of it. It was property thus situated and circumstanced that the pledgor in the one case intended to pledge and believed that he was pledging, and the vendor in the other intended to sell and believed he was selling, and the legal title to which the pledgee and vendee, respectively, had good reason to believe they had received. It is true, they relied largely on the transfer of the so-called warehouse receipts, but attached to these receipts were the Gauger's certificates, specifying by serial number and brand the particular barrels of whiskey that were the subject of the sale, and nothing required by such a sale or pledge, was left undone by vendee or pledgee. At common law, sales of personal property do not require to be documented, though documents, such as bills of sales and warehouse receipts, may be convenient evidence of such a sale.

We think the transactions here under consideration, between the pledgor and pledgee and the vendor and vendee are quite within the spirit and

meaning of the rule as to sales of personal property, established by the decisions of the Supreme Court of Pennsylvania. No aspersion is attempted to be made of the perfect good faith obtaining in each case. To all the world, but especially to those engaged in the business of distilling and buying and selling whiskey, it was apparent that the physical custody and control of the whiskey here in question was not in the distiller and vendor, but in the Revenue Officers of the United States, and in neither case was the distiller capable of making physical delivery to his pledgee or vendee. All those doing business with these distillers, including creditors, were bound to take notice of this notorious physical fact and were put upon due inquiry, and had imposed upon them the duty of self-protection, as to the title of the goods so situated. It was a situation created and established by a law of the United States, of which all persons, creditors as well as others, were presumed to have had knowledge."

As to the absence of any fraudulent intent, or any fraud in fact, or want of good faith, the Court found (Record, page 33):

"It should be premised that the records disclose that the pledge in the one case and the sale in the other were for value, and without fraud in fact, and were both made more than four months before the petition in bankruptcy was filed."

(C) The nature and object of the transaction, and

(D) The position of the parties.

There is no reason whatever for taking the whiskey away; there is every reason for letting it stay.

The practical reasons which influenced the trade to adopt the method of doing business which prevails and led to the issuing of those warehouse receipts have been discussed to some extent in showing why these warehouses were established by the governmental regulations, and the policy of justice and fairness which influenced the government in deferring the payment of taxes.

It is no doubt true that whiskey withdrawn from the distillery warehouse, in the hands of a third party, at once depreciates in value, because of the fear of adulteration and the lack of the guarantees afforded by the gaugers' certificates and the control of the government.

Likewise, the right of the distiller or owner to bottle the whiskey in bond under the provisions of the revenue laws is lost in case the whiskey is removed from the warehouse. This right is an extremely valuable one, and has come to be regarded in the trade as a guaranty on each bottle of the standard of purity, quantity and quantity.

The Act of Congress of March 3, 1897, ch. 379, 29 Stat. L., 626, provides:

> "Whenever any distilled spirits deposited in the warehouse of a distillery having a surveyed

daily capacity of not less than twenty bushels of grain, which capacity of not less than twenty bushels thereof is commonly used by the distiller, have been duly entered for withdrawal upon payment of tax ,or for export in bond, and have been gauged and the required marks, brands, and tax-paid stamps or export stamps, as the case may be, have been affixed to the package or packages containing the same, the distiller or owner of said distilled spirits, if he has declared his purpose so to do in the entry for withdrawal, which entry for bottling purposes may be made by the owner as well as the distiller, may remove such spirits to a separate portion of said warehouse which shall be set apart and used exclusively for that purpose, and there, under the supervision of a United States storekeeper, or storekeeper and gauger, in charge of such warehouse, may immediately draw off such spirits, bottle, pack, and case the same."

It will be observed that this statute recognizes the owner of the whiskey as well as the distiller, and gives to either the right to bottle the whiskey in bond under its provisions. The provisions of this statute relating to "owner" can not be carried out without a change of ownership of the whiskey in the warehouse prior to actual delivery, or removal. Clearly the direct wording and meaning of this statute require that a transfer of title and possession by means of warehouse receipts or other constructive delivery be recognized as sufficient.

Likewise, the United States government regulations do not allow whiskey to be bottled in bond until it has aged for at least four years. Section 2, Act March 3, 1897, ch. 379 (29 Statutes at Large, 627). Section 50 of Act of August 27, 1894 (28 Statutes at Large, 564).

It is, therefore, a well-established custom among distillers to sell their bonded whiskey long before the four years' period of ageing has elapsed, and to store the whiskey so sold for the purchaser until it is ready for bottling. Were this custom overthrown, it would require each distiller to have almost unlimited capital of his own tied up continuously in the great quantities of whiskey held under bond for the necessary ageing in his warehouse. He could neither sell it nor borrow money upon it as security.

Moreover under Revenue Act August 28th, 1894, Ch. 349, Sec. 50, 28 Stat. at Large, 564, an allowance is made by the government for shrinkage by leakage, evaporation, etc., commonly known in the trade as "outage." If, therefore, the whiskey is removed before the ageing process is completed and delivered to the purchaser or pledgee or stored elsewhere, these outage allowances would be lost and the distiller, purchaser or pledgee would not only have to pay the government tax in advance, and lose the interest, but would also have to pay such tax on whiskey he would not obtain. The allowance runs as high as nine gallons for whiskey stored between 45 and 48 months. The tax on this would amount to $9.90 per barrel, or from 25% to 50% of the selling price of the whiskey, depending upon its age at removal. There would also be a loss in shrinkage from transportation and the privilege of bottling in bond would be gone.

The case now before the court for consideration is a striking illustration of the benefits of this custom. "The nature and object of the transaction" was that the Distilling Company desired to borrow money from the bank for use in its business. It borrowed $2,500 and gave as collateral security therefor 200 barrels of whiskey. This whiskey was in its bonded warehouse and delivery

thereof was by warehouse receipts. The whiskey, being in bond, could not be actually delivered to the bank without payment of the government tax. To pay this tax the Distilling Company would have been compelled to pay to the government more than $10,000—almost four times the amount of its loan—and the whiskey was not yet fit for consumption because not properly aged.

It needs no argument to show that such a proceeding would entirely defeat "the nature and object of the transaction" as contemplated by the parties. Such being the case, the constructive delivery by means of the warehouse receipts was sufficient under the circumstances and should be sustained.

It is said by Judge Archbald in his opinion filed in this case, that:

> "It is provided by Act August 28th, 1894, Secs. 51, 52*, 28 Stat., 564, that, in the discretion of the Internal Revenue Commissioner, general bonded warehouses, not exceeding ten in number, may be established in each collection district, to which distilled spirits may be removed by a distiller from his distillery warehouse, under such regulations with regard to bonds, removal stamps, etc., as the Commissioner may prescribe. And wherever bonded warehouses of this character exist, as was the case here, every distiller of the district has a place, entirely separate and distinct from his own establishment, where the product of his distillery can be removed and stored under bond, with the same advantage as if stored in a distillery warehouse of his own, and where they may be sold or pledged by means of warehouse receipts, which cannot be questioned, without the necessity of resorting to receipts of his own, which are only such in name."

This argument involves several misapprehensions of fact and law. Whiskey stored in the general bonded warehouses, loses the advantage of the bottling regulations of said statutes and loses the advantages of being aged under the care and direction of the distiller as to handling, temperature, etc. The transportation charges and handling charges must be paid, on the shipment from the distillery to such warehouse. Moreover, no general bonded warehouse has ever been established in the collection district in question; in fact the nearest general bonded warehouse is located at Pittsburgh, Penna. There are only twelve general bonded warehouses in the entire United States, and the total capacity of the entire twelve would hardly be sufficient to hold the output of a single large distillery.

The Commissioner of Internal Revevnue some years ago refused permission to establish a General Bonded Warehouse in Cincinnati, the largest whiskey market in the United States, on the ground that there was no necesity for it; he also abolished such a warehouse in Richmond, Virginia, by withdrawing the permit. These general bonded warehouses have no advantages over any other warehouse except that payment of the tax need not be made in advance, and outage allowances are granted. Moreover, the guaranty of genuineness, etc., from being stored in these distillery warehouses, a most important consideration, is lost.

If the argument with reference to the general bonded warehouse is meant to be an answer to the argument of inconvenience, and to the custom and usage of the trade, then it would seem that a sufficient reply would be that those familiar with the trade, and in the business, have not found it wise or expedient to use these general bonded warehouses for the purposes for

which distillery warehouses are used. Some of the reasons therefor have been already referred to.

When we consider the complete possession and control of the government over the whiskey; that the owner has no access to it and cannot even see it except by permission of the government; that the manner in which it shall be marked is prescribed by law, and the owner has no right to mark it otherwise; that neither a pledgee nor purchaser, nor the owner of the whiskey can remove it from the warehouse except upon the payment of the tax and must remove it immediately upon payment of the same; that the distiller cannot deliver possession of the whiskey to a third person except as provided by law; and the absence of even a semblance of exclusive possession on the part of the owner; it would seem that the only method of constructive delivery possible was followed and no person could be injured thereby.

Certainly the creditors of the Distilling Company could not claim that they had been misled to their injury, because they had no access to the interior of the warehouse. They are chargeable with a knowledge of the law, and the provisions of the Federal Statutes. They could not, therefore, possibly have been misled by the presence of the whiskey within the warehouse. They cannot be deemed to have given credit upon the faith of whiskey in a warehouse of which they had no means of ascertaining the contents.

(E) The usages of trade or business.

In consequence of the conditions above discussed, the last consideration named by Justice Brown, "the usages of trade or business," grew up, and the trade

has been habituated to the issue of warehouse receipts with the certificates of the gauger thereto attached, just as was done in this case, to obviate the loss, damage, expense, and inconvenience of actual delivery.

Having regard now to the rule, and the reason for the rule, and the exceptions to the rule, of *Clow vs. Woods*, construing the Statute of 13th Elizabeth, the question presented is: Was this such a case as justified the constructive delivery attempted by these warehouse receipts? The Statute of Elizabeth was intended to prevent fraudulent transfers and conveyances. The decisions hold that where a party retained the possession of personal property which was susceptible of delivery, and for the non-delivery of which there was no reasonable, fair explanation reconcilable with honesty and good faith, the retention of such possession was *per se* evidence of fraud, was constructive fraud, and this, because the retention of such property gave to the vendor retaining the same, a false credit. Having in his possession personal property, he was presumed to own it, and every one was justified in dealing with him upon this supposition. We have seen how the trend of industrial and commercial development made it necessary to depart from the strictness of this rule, until exception after exception was grafted upon the law, and the courts were driven to say that there is no unbending test of the sufficiency of delivery and retention of possession, but that, in passing upon the question, regard must be had to the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of trade or business.

The reason for the rule making fraudulent as against creditors transfers of personal property unaccompanied by actual delivery is based upon the fictitious credit permitted by allowing possession to remain in the debtor.

The reason and the rule alike cease where credit could by no possibility have been given upon the faith of the possession of the goods.

It has been shown above that the actual possession of the whiskey in controversy was not in the bankrupt.

In whose possession was the whiskey?

The necessary elements of possession have been noted, *supra*.

With subtle and searching analysis it is argued, that the possession of the spirits is not technically in the storekeeper or the Government, notwithstanding that the distiller cannot get at it, and the Government officials are the only ones who can.

The reason for the rule requiring physical possession to be taken of the goods, fails where the goods are not in the actual possession and control of the debtor, irrespective of the character of possession and control of the third person. It is not because the third person is technically a bailee, it is because the debtor is no longer in the possession of the goods. The goods might be in the possession of a policeman or of a thief, they could be sold by the real owner, and an order given therefor which would pass title to the purchaser. The

controlling factor is not the character of the other's possession, but the fact that there is no deceptive possession in the debtor.

If there were the slightest suggestion of actual fraud, the situation would be entirely different. There is no pretense that the appellee was not a holder in good faith and for a valuable consideration. Unless the court is obliged to hold that there was legal or imputed fraud, notwithstanding the conceded good faith of the transaction, the inquiry resolves itself into: What was the legal effect of the transaction as between the parties?

Is there any doubt that a buyer or pledgee as against the seller or pledgor may insist upon the delivery of the goods?

If under the decisions of the Supreme Court of Pennsylvania and the custom of the trade, and the substance of the transaction as it would be regarded by the people, it is held that the possession of the goods was sufficiently out of the distiller so that the transaction need not be denounced as legally fraudulent, it is at once evident that as between the bankrupt and the bank, the latter is in law and in equity entitled to its bargain.

As between the parties, the pledgee's rights to the goods, no equities having intervened, must be likewise superior to the pledgor's. Does he not get title subject to the pledgor's right to redemption? As between the parties, if the pledgor retakes the subject of the pledge, without paying the money he has been loaned thereon, his act is wrongful, whether the goods are in his pos-

session or in the possession of a third person. Is he not guilty of conversion? If technically not guilty of conversion because of the absence of any necessary legal elements, yet in substance the pledgor's rights must be subject to the pledgee's rights to reduce the pledge to actual possession, unless equities have intervened.

The agreement of pledge necessarily involves an assignment or transfer of the goods, the pledgee to hold them as security for the payment of a debt, the only right of the pledgor being to pay the debt and redeem the goods, or to the excess in the event of sale.

A pledge unaccompanied by possession may be defeated by an innocent third party, but the pledgee having parted with his money, has the right of possession and the right to reduce to possession as against the pledgor.

A transfer of property in the hands of a bailee is good against the creditors of the owner without actual delivery.

Linton vs. Butz, 7 Pa., 89 (1849);
Worman vs. Kramer, 73 Pa., 385 (1873);
Woods vs. Hull, 81 * Pa., 453 (1875);
Caulfield vs. Van Brunt, 173 Pa., 433 (1896).

The form of the transaction is immaterial, if the intent is clear to make the chattel security for the present advance. The substance is the same as if the pledgor had said: "I assign, transfer, and set over said goods, and I agree that you may forthwith reduce same to physical possession."

The pledgor cannot thereafter be permitted in honesty or good conscience to deny the pledgee's right of possession, or to interfere with his right to reduce to possession. There is commercially an implied duty to aid the pledgee in obtaining possession. Whether the pledge be of shares of stock, the certificate for which is in the hands of another, or of property seized by officers of the law, or of a horse stolen and placed wrongfully in another's livery stable, the pledgee would clearly have the right as against the pledgor to reduce to possession.

Possession may be held by a third person for the pledgee when such person will be considered as the pledgee's agent.

Brown vs. Warren, 43 N. H., 430 (1862);
Tibbetts vs. Flanders, 18 N. H., 285 (1846);
McCready vs. Haslock, 3 Tenn. Ch., 13 (1875);
Johnson vs. Smith, 11 Humph. (Tenn.), 396 (1850);
Weems vs. Delta Moss Co., 33 La. Ann., 973 (1881);
First Nat. Bank vs. Harkness, 42 W. Va., 156, 166; 24 S. E. Rep., 548 (1896);
Lewis vs. Dillard, 76 Fed. Rep., 688; 22 C. C. A., 488 (1896).

"We have observed for several years a growing laxity on the part of judges and jurists in the application of the principles of constructive pledge delivery, until now it must be confessed there are authorities of great weight and respectability that hold that, as between the parties themselves, an actual delivery may not be necessary and that the

possession may be regarded constructively where the contract places it."

Per Mr. Justice Loomis in *Huntingdon vs. Sherman,* 80 Conn., 463, 467; 22 Atl. Rep., 169 (1891).

See also *Tuttle vs. Robinson,* 78 Ill. 332; and *Martin vs. Reid.,* 11 C. B. (N. S.), 730.

"Where personal property is pledged the pledgee acquires the legal title and the possession. If it remain in the apparent possession of the pledgor, he holds as agent of the pledgee."

Syllabus in *Easton vs. German American Bank,* 127 U. S., 532 (1887).

It has been stated in the opinion of Judge Archbald that there is possibility of duplication and fraud, and that, when once the taxes have been paid, the government officials in charge cannot restrain the distiller, no matter what receipts or certificates are known to be out, from disposing of the goods in the distillery warehouse to whomsoever he may choose, and he adds, "and this is the whole case."

It may be with propriety suggested, the same statement would be true of any warehouseman, (who would not even have to pay any taxes) if the goods were stored in a public warehouse. Notwithstanding the issuing of warehouse receipts, notwithstanding the fact that he has no claim or title to the property whatsoever, nevertheless, if he is dishonest he can sell and dispose of the goods to whomsoever he may choose. There is as much possibility of duplication and fraud in

the issuing of receipts in the case of a general public warehouseman as there is in the issuing of receipts by a distiller for goods in storage in the distillery warehouse. Duplication and fraud in both cases presuppose dishonesty, for which there are penal statutes, and in neither case can there be duplication or fraud without the commission of crime.

The statement in the opinion of Judge Archbald, "the possibility of duplication and fraud, of which there are examples enough in the books, to say nothing of what is reported to have occurred here, is sufficient to condemn the custom, if there was nothing more," was evidently written upon a misapprehension.

In the State of Pennsylvania, notwithstanding the fact that in the last 45 years there have been hundreds of millions of such certificates issued, the cases of fraud that can be found in the books are, in comparison, fewer than the cases relating to the commission of almost any other crime prohibited by the criminal law of this State. A search of the reports discloses so very few cases that this statement of the learned Judge is incomprehensible, in view of the millions upon millions of dollars that have been involved.

Moreover, as has already been suggested, the legislature of the State of Pennsylvania, in adopting the "Warehouse Receipts Act" of 1909, and the Commission on Uniform State Laws, which framed that Act, and the legislatures of the various States that have adopted that Act, have by express enactment authorized the issuing of warehouse receipts by warehousemen for goods of their own, stored with themselves; and evidently, therefore, the apprehensions of the learned court are not shared by them.

Let us keep in mind the subject here in controversy. It is whiskey in a bonded warehouse—goods in process of manufacture. Such goods require the care and supervision of the distiller in order to age properly under regulated temperature and conditions. There is no demand for the goods until it is so aged. The whiskey is not marketable for actual consumption until properly aged. It is totally unfit for consumption until so aged. The goods are in process of manufacture and this alone justifies the retention by the pledgor. The government does not permit the whiskey to be bottled in bond until it is at least four years old. The goods cannot be removed until the tax is paid, and the tax cannot be paid, without loss, until there is an actual demand and market for the whiskey. Meanwhile the whiskey cannot be touched by any one except in the presence of the revenue officers of the federal government. The locks, keys and bolts are absolutely controlled by these officers. Every reason of policy and prudence, safety, necessity, and usage of business, require that the whiskey be retained in the warehouse, so that its manufacture into a finished product for consumption can be completed, and so as to guarantee its genuineness and freedom from adulteration, and so that it can be bottled in bond, if desirable, and so that the "outage" allowances can be deducted. The purchaser or pledgee who keeps his whiskey in bond in the distillery bonded warehouse can by reason of his advantages undersell any one who removes the same. The advantages are so great, almost equalling indeed the original cost of production, as to amount to a handsome profit.

Under these circumstances, and under the peculiar conditions affecting bonded warehouses, whether the

certificates, bills of sale, or receipts, be warehouse receipts or not, they are a sufficient symbolical delivery to comply with the law of Pennsylvania. The usage of trade for many years has sanctioned such symbolical delivery. The character of the property, *i. e.*, whiskey newly distilled, goods in process of manufacture; the use to be made of it, namely, to be sold for consumption when properly cured and aged; the nature and object of the transaction, to wit, the purchase of whiskey to be kept in bond, to be cured and aged without the loss of interest by paying taxes, and with absolute guarantees of genuineness and freedom from adulteration, and with the opportunity of benefiting by the "outage" allowances; the position of the parties, that is to say, the one a distiller, keeping such bonded warehouse, the only party who can cure and properly age such whiskey, and the other party the dealer who buys to sell again, or to use when ready for use, or to hold as security for a debt until it is ready for sale or use; and the usages of the trade or business, viz: exactly what was done in this case as an unbroken custom for nearly half a century; all conspire and unite to establish that the retention of possession by the distiller in his warehouse was for a purpose fair, honest and essentially conducive to the object the parties had in view and which constituted the motive for entering into the contract.

III.

ESTABLISHED TRADE CUSTOMS, WHEN LONG CONTINUED AND UNBROKEN, BRING WITH THEM STRONG PRESUMPTIONS OF THEIR LEGALITY AND VALIDITY.

Counsel submit that it is the unbroken usage and custom of the trade to treat distillery bonded warehouse receipts as technical warehouse receipts, and to sell and pledge them freely and without question, in reliance upon the assumption that they represent the whiskey. Much has already been said in this brief of argument on this subject and repetition will be avoided as far as possible.

A custom of trade once established and recognized should not be lightly stricken down by the court. It is entitled to every presumption in favor of its reasonableness and validity. The best law often finds its basis in the usages and customs of the people. Such customs must yield to express statutory provisions, or established public policy, but when reasonable they should be encouraged rather than destroyed by the Courts. The trial court found that:

> "It is the unbroken custom of the trade—the evidence leaves no doubt upon this point—to treat storage receipts for spirits as completely equivalent to the spirits themselves and to sell or pledge them freely and without question."

This brings us to the not unimportant considerations, that founded upon this statute of the United

States, and in promotion of its general purpose, the custom and usage, of which these records compel us to take notice, has grown up in the trade, to freely buy and sell whiskey in such bonded distillery warehouses, such sales being evidenced by the delivery of these storage certificates and so-called warehouse receipts, in lieu of the physical possession which the distiller or owner is incapable of delivering without a surrender of the privileges the statute was intended to provide. In his opinion in the Taney case, the learned judge (McPherson) of the court below finds as a fact that the evidence leaves no doubt upon the point, that it is the unbroken custom of the trade to treat these storage certificates as completely equivalent to the spirits themselves, and to sell or pledge them freely and without question. In so far as the custom sanc[illegible]s the underlying sale and purchase of whiskey thus situated, and recognizes these certificates and so-called warehouse receipts as evidence thereof, the custom is reasonable and within the philosophy of the rule which dispenses with the necessity of delivery of physical possession, where the possession is not in the vendor but in a third person for a lawful purpose, and the non-delivery is consistent with the honest intent and object of the sale. So that, even if this custon of the trade of long continuance, and reasonable in itself, were in some particulars inconsistent with the general rule of law, but not conflicting with any settled public policy, it might settle the question in hand. From what we have said, it is apparent that it is not inconsistent with either public policy or public law in the state of Pennsylvania.

The rule is thus stated in 12 Cyc., 1053:

"It is laid down in a number of cases that a custom or usage in opposition to an established

rule of law is void and of no effect. But this is not correct. It was no objection to a common-law custom that it was contrary to the common law of the land. And a custom or usage of trade or of a particular place is not inadmissible because it is contrary to the principles of law governing such cases; for it is obvious that if proof of a usage could be rejected because it established something different from the law no custom would ever be proved, because if it were not different it would be a part of the law. Nevertheless usages and customs have been rejected because inconsistent with established rules of law. This apparent contradiction has been explained as follows: The meaning of the rule that a usage or custom must not conflict with the law is clear and the rule itself easy of application. A usage or custom is not invalid simply because it is different in its effect from the general principles of law applicable to the particular circumstances in its absence. But if it conflicts with an established rule of public policy which it is not to the general interest to disturb; if its effect is injurious to the parties themselves in their relation to each other; if in short it is unjust, oppressive, or impolitic usage, then it will not be recognized in the courts of justice, for it will lack one of the requisites of a valid custom, viz: reasonableness."

In hundreds of instances and thousands of citations, customs have been recognized as conferring rights different from or in addition to those existing under the general law: 12 Cyc. 1061, *et seq.*

The case of *Priestley vs. Pratt*, L. R. 2 Ex. 99, 102, is a good illustration of this principal. That was a

case of trover by the buyer to recover from the seller's assignees in bankruptcy lambs and pigs left in the hands of the bankrupt. The buyer proved a custom well known with the trade to leave goods in the possession of the seller for a reasonable time after they were purchased. The assignee sought to hold the property on the ground that the animals were in "the disposition of the bankrupt at the date of his bankruptcy." On this question it was said by

KELLY, C. B.:

> "That question depends in all cases on whether there is shown to exist with respect to the articles in question, any custom of trade, so notorious as practically to be known to all who do business with those dealing in such articles, and who are called upon to consider the question of giving credit to them, by virtue of which goods, in reality the property of others, are allowed to remain in the actual possession and physical power of disposition of the bankrupt. Looking at the circumstances of this case, it is difficult to imagine a stronger case of a notorious custom—notorious to all who are acquainted with the practice of farming. There is here no question of opposing evidence, but the jury themselves interpose in the course of the evidence, and say that the custom is so notorious as to make the evidence unnecessary. On this finding it must be taken that the custom was known to all who might be prejudiced by the apparent ownership; and that any one who was about to give credit to a farmer would not take it for granted that all the cattle he saw upon the farmer's land were his own, and give credit on that footing, but conjecturing that they might be the property of others, would exercise a corresponding caution. * * *

Without relying on *Re Terry*, 7 L. T. N. S. 370, in the Bankruptcy Court, although that case was decided by a very learned person, of great experience in this branch of law, the case of *Prismall vs. Lovegrove*, 6 L. T. N. S. 329, in conformity with other modern cases, establishes that wherever a custom exists so notorious that it may be presumed to be known to all persons engaged in the business, that the buyer should leave the goods bought in the hands of the seller for a certain time, and they are not left for a longer time than is clearly within the custom, they are taken out of the reputed ownership clause, and the buyer is entitled to recover them from the assignees in bankruptcy of the seller. The present case falls within that description, and the plaintiff is therefore entitled to recover."

See also *Ghen vs. Rich*, 8 Fed., 159.

Trespass for entering plaintiff's close and erecting stalls, booths, etc., there. Defendant justified under a custom that at fairs held on some part of the commons of a manor, to be named by the lord of the manor, every liege subject exercising the trade of a victualler might enter at the time of the fairs, and for the more conveniently carrying on his said trade, erect a booth, etc. *Held*, The custom was reasonable, Tindall, C. J.

"A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for '*consuetudo ex certa causa rationabili usitata privat communem legem*' (Co. Litt. 113 A), as the custom of gavelkind and borough English, which are directly contrary to the

law of descent, or, again, the custom of Kent, which is contrary to the law of *escheats.*"

Tyson vs. Smith, 9 A. & E., 406-421 (1838).

"It has been fully proved to exist by all the witnesses. Its reasonableness depended upon the proof of its general use and indeed I might say, upon its being established as a general custom. For, the proof of a general custom furnishes a strong reason why we should regard it as reasonable. It must be sanctioned by general concurrence with use for several years before it can be said legally to exist. If it was unreasonable, and of course without necessity, reasonable and prudent men would not continue to peril both life and property to give it existence. From proof of it as the general custom of the trade, we are bound, at least *prima facie,* to conclude that it is reasonable."

Cox, Maitland & Co. vs. The Charleston F. & M. Ins. Co., 3 Rich. (S. C.) 331 (1832), page 333.

"A custom is not unreasonable merely because it is contrary to a particular rule or maxim of the common law."

12 Cyclopedia of Law and Procedure, page 1084.

Lord Kenyon, Ch. J.

"It is no objection to a custom that it is not conformable to the common law of the land, for it is of the very essence of a custom that it should vary from it."

Horton vs. Beckman, 6 T. R., 760 (1796), page 764.

The Supreme Court of Pennsylvania, in the case of *Miller vs. Browarsky*, 130 Pa., 372, (1889) recognizes this custom of the trade whereby a system regulating the transfer of bonded whiskey by means of certificates called warehouse receipts had been adopted.

And whether or not the custom of the trade has the force and effect of law, it negatives any charge of constructive fraud. It is to be assumed that those in the trade and those dealing with the trade knew of the usages thereof:

Guillon vs. Earnshaw, 169 Pa., 463 (1895).

The creditors, therefore, knew that the whiskey might have been sold or pledged and customarily was sold and pledged to raise money for the prosecution of the business.

"The usages of a trade or business" are to be considered in passing upon the sufficiency of symbolical delivery and retention of possession.

White vs. Gunn, 205 Pa., 229 (1903).

When a trade usage has existed for many years and has been uniformily acquiesced in by all, it means that it has been long regarded by the mass of mankind as fair and reasonable, and as furnishing the true rule for best adjusting the rights and equities of those affected thereby. These usages and customs represent the unanimous consent of the particular trade as to the most practical method of transacting business. Here the practice was predicated on the foundation right to permit the whiskey to remain in bond, and the substantial, indeed indispensable, advantages attendant

upon this right. As the crystalized common sense of the commercial community, such a custom carries with it the strongest presumption of reasonableness and validity.

IV.

THE TRANSACTION WAS NOT FRAUDULENT IN FACT, AND THE WHISKEY IN QUESTION NOT BEING SUBJECT TO EXECUTION ON ACCOUNT OF THE CUSTODY AND POSSESSION OF THE GOVERNMENT, THE TRUSTEE'S RIGHTS ARE NOT SUPERIOR TO THOSE OF APPELLEE AS A BONA FIDE HOLDER FOR VALUE PRIOR TO THE DATE OF THE ADJUDICATION IN BANKRUPTCY.

It has already been fully established by the facts and argument in this case, that the transaction was not fraudulent in fact. In reality there is no such contention in this case. Under such circumstances what, if any, rights can the trustee in bankruptcy have as against the pledgee, that are superior to those of the bankrupt? If he has any such rights they must arise out of the provisions of the bankrupt act. An assignee for the benefit of creditors would have no such rights. There being no actual fraud, the transaction being entirely free from dishonest purpose in accordance with

the custom and usages of the trade, the pledgee having paid and the pledgor having received full consideration, if the trustee in bankruptcy is to have rights to rise above considerations of fairness and honesty as between the parties and he can ignore this transaction, which the parties themselves were bound to observe, it must be on account of some specific provision of the bankrupt law.

The pledgee was a bona fide holder of the whiskey for value and in due course of business prior to the date of the adjudication. The property was not pledged in fraud of creditors. The proceeds of the loan to the bankrupt went into its general estate. The trustee cannot then be vested with title to the whiskey as being "properly transferred by the bankrupt in fraud of his creditors;" this applies only to actual fraud, not to constructive fraud. (Bankruptcy Act, section 70a—4.) Nor can the trustee claim it as "property, which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial proceedings against him." (Id., section 70a—5.)

The property could not have been levied upon and sold under judicial process against the bankrupt, because whiskey in a distillery bonded warehouse is not subject to levy.

Fischer vs. Dohistal, 9 Fed. Rep., 145 (1881).
McCullough vs. Large, 20 Fed. Rep., 309 (1884).

Whiskey in a bonded warehouse is not subject to levy.

There was no actual fraud.

There was no such "legal fraud" as would have permitted creditors to levy upon the whiskey.

The bankrupt was not in any way given a fictitious credit.

The buyer is only obliged to take the possession of which the subject matter is reasonably susceptible.

Many things excuse delivery of possession if the purpose of the transaction is fair and honest.

One excuse in particular is that goods were in process of manufacture.

These goods were in such process.

There was therefore no constructive fraud.

White vs. Gunn, 205 Pa., 229 (1903);
McCullough vs. Wiley, 200 Pa., 172 (1901);
Williams vs. Mill, 174 Pa., 299 (1896);
Goddard vs. Weil, 165 Pa., 419 (1895);
David vs. Oxenrides, 43 Pa. Super. Ct., 506 (1910);
Gibson vs. Stevens, 8 How. (U. S.), 384 (1850);
Whittle vs. Phelps, 181 Mass., 317 (1902);
Mercantile Co. vs. Schulz, 56 Wash., 393 (1909);
Kingsley vs. White, 57 Vt., 565 (1885).

The provisions of the Bankruptcy Act, relating to the rights in the bankrupt's property to which the Trustee succeeds, have been interpreted and applied in a number of cases.

In *Security Warehousing Co. vs. Hand*, 206 U. S., 415, 423 (1907) it was said by Mr. Justice Peckham:

> "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the bankrupt act, is subject to all of the equities impressed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule. *Hewitt vs. Berlin Machine Works*, 194 U. S., 296; *Thompson vs. Fairbanks*, 196 U. S., 516, 526; *Humphrey vs. Tatman*, 198 U. S., 91; *York Mfg. Co. vs. Cassell*, 201 U. S., 344, 352."

And in the case of *In re Garcewich*, 115 Fed., 87 (1902), it was said by Wallace, C. J.:

> "Under the present bankrupt act, as under previous bankrupt acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act. *Winsor vs. McLellan*, 2 Story, 492, Fed. Cas. No. 17,887; *Allen vs. Massey*, 17 Wall., 351, 21 L. Ed., 542; *Donaldson vs. Farwell* 93 U. S., 631, 634, 23 L. Ed. 993; *Yeatman vs. Institution*, 95 U. S., 764, 24 L. Ed. 589; *Adams vs. Collier*, 122 U. S., 382, 7 Sup. Ct., 1208, 30 L. Ed., 1207; *Norton vs. Hood*, 124 U. S., 20, 8 Sup. Ct., 357, 31 L. Ed., 364; *Chattanooga Nat. Bank vs. Rome Iron Co.*, (C. C.) 102 Fed., 755. It is not the meaning of the present act that the institution of proceedings in bankruptcy should se-

cure immunity to the title of fraudulent vendors or mortgagors, and deprive creditors of a resort to property out of which, but for the proceeding, they could have satisfied their claims. Section 70 declares in express terms that the title of the bankrupt shall vest in the trustee to 'all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' That language is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another."

It is submitted, therefore, that there being no fraud in fact, and the whiskey in controversy not being subject to execution (on account of the custody and possession of the government for the collection of taxes), the trustee's rights under the bankruptcy act are not in any way superior to those of the bank. The bank being a *bona fide* pledgee for value in due course of business, by the delivery of the warehouse receipts for the whiskey in controversy, for a loan obtained from it before the adjudication in bankruptcy, is entitled to said whiskey as against the bankrupt, his trustee, and his creditors, there being no provision in the bankruptcy act changing the law as heretofore existing on this subject.

Since this case was decided by the Circuit Court of Appeals, there have been two cases in the Federal courts, both reported in 196 Fed. Rep., namely, *Pattison vs. Dale*, 196 Fed., 5 (Circ. Ct. of App., 6th Circ.), and *Merchants National Bank vs. Distilling Company*, 196 Fed., 76, (Maryland Circuit).

In the Pattison case, Warrington, C. J., delivering the opinion of the Court, says, at page 11:

"There is much controversy, however, touching possession of the whiskey; Pattison claiming that it is in the government, and the trustees that it was in the distiller and is now in them. This results in contention on the part of the trustees that the distiller was nothing more than his own warehouseman respecting his own warehouse receipts. The argument assumes the question. It treats Rohrer's relations to the warehouse and whiskey precisely as if his custody and control were absolute and exclusive. It will not do to say either that he was in actual possession, or that he could (without paying the tax and losing the opportunity given to age the spirits) effect a physical change of possession. *Union Trust Co. vs. Wilson, supra* (198 U. S., 530, 25 Sup. Ct. 766, 49, L. Ed. 1154). The most that he could do was, in virtue of his title, to give constructive possession through symbolic delivery; and then only subject to the rights of the government. And this seems to be just what he attempted to do; for the receipts were given in 'conformity' with the laws of the United States, and each contains an agreement that the pledgee shall supply the money to pay the excise tax."

* * * * * * * *

"Nor is the claim tenable that the whiskey gave credit to the distiller, and the pledge operated to defraud his general creditors. The whiskey was not visible. The public had no access to the warehouses. *Taney vs. Penn Nat. Bank*, 187 Fed., 703, 109 C. C. A., 437 (C. C. A., 3rd Circ.); *Union Trust Co. vs. Wilson, supra*, 198 U. S., 538, 25 Sup. Ct., 766, 49 L. Ed. 1154."

* * * * * * * *

"There is also to be added the weight and effect of the custom respecting the pledge of whiskey deposited in distillery warehouses. The averments in this behalf are set out in the answer and cross-petition and of course so far as well pleaded are admitted by the demurrer. They are to the effect that these transactions were had in accordance with a custom of trade of more than 40 years' standing, extending throughout the country; that under the custom, distillers, bankers, brokers and dealers in whiskey have during that time treated warehouse documents like these as giving constructive possession of the barrels of whiskey and as conveying an interest in the whiskey according to the nature of the transaction; and that the receipts have been treated as transferring, through indorsement, the rights of the original holders of the whiskey described in them. We cannot under the pleadings accept the suggestion that this custom rests on or is affected by a statute of the State of Kentucky."

* * * * * * * *

"Furthermore, instruments similar to those now in issue have been recently upheld in well considered decisions. In *Taney vs. Penn Nat. Bank*, 187 Fed., 689, 702, 109 C. C. A., 437, 450 (C. C. A., 3rd Circ.), Judge Gray cogently discussed the question of the sale of whiskey stored in distillery warehouses."

* * * * * * * *

"*Merchants' National Bank of Baltimore vs. Roxbury Distilling Company*, 196 Fed., 76, was brought in the Circuit Court of the United States for the District of Maryland, and decided by Mr. John Hinkley, Special Master. Distillery warehouse receipts given in pledge were sustained. A

statute of Maryland provides that all warehouse receipts issued by a United States distillery warehouse shall be governed by and be subject to the state act as fully as are the warehouse receipts of any warehouseman. Irrespective of the statute, the master said:

> 'It seems clear to me that there is adequate reason for recognizing the validity of distillery warehouse receipts which has been given to them by long course of dealing by the traders and the banks, and that this contention should prevail. It is a growth and development of the doctrine of constructive or symbolical delivery which I have attempted to trace in this opinion, and of the underlying principle that the courts will recognize as constructive delivery that form of delivery which the character and situation of the goods imperatively requires.'

He reached the conclusion that the receipts 'are valid not only inter parties or against solvent distillers, but absolutely as vesting title in such purchasers or liens in favor of such pledgees, against subsequent creditors.' "

In the case of the *Merchants National Bank vs. Roxbury Distilling Company*, 196 Fed., 76, at page 101, Morris, D. J., says:

> "By the Maryland Code all warehouse, elevator or storage receipts whatsoever for goods deposited are declared to be negotiable instruments, and full and complete title to the property therein mentioned shall vest in the *bona fide* holder for value.

"But independent of the special enactment of Maryland with regard to distillery warehouses, I am in full accord with the special master in his conclusion that, because of the peculiar situation of the distilled spirits stored in a bonded distillery warehouse, there is by the transfer effected by the warehouse certificate as full a delivery of the goods as is commercially possible under the special circumstances attending distilled spirits stored in the bonded distillery warehouses of the United States.

"I will not prolong this opinion by a recital of those circumstances or of the reasons why a constructive delivery should result from the issuing of such warehouse certificates. It will be sufficient to refer to the very able discussion of the question in the opinion of the special master returned to the court in this case, and to the learned and convincing opinion of Circuit Judge Gray in the Circuit Court of Appeals for the Third Circuit in *Taney vs. Penna. Nat. Bank of Reading,* 187 Fed., 689, 109 C. C. A., 437.

"It appears that this constructive delivery is commonly made use of by those dealing in whiskey, and money is loaned on pledges of the certificates by banks and others in sums of great magnitude. This is so because whiskey usually must be kept in the distillery warehouse five years to mature, and in no other way could the necessary money be raised and the whiskey itself be commercially dealt with except by the use of these warehouse certificates representing the whiskey.

"The rules of commercial law are built up upon the actual dealings which have the sanction of honest and competent merchants and which are necessary to carry out honest transactions in the fairest manner.

"The Maryland Court of Appeals in several cases involving the proper taxation of whiskey stored in distillery warehouses has recognized the holder of the warehouse certificate as the owner of the whiskey. *Monticello Distillery Co. vs. Baltimore City,* 90 Md., 416, 45 Atl., 210; *Fowble vs. Kemp,* 92 Md., 637, 48 Atl., 379; *Carstairs vs. Cochran,* 95 Md., 488, 52 Atl., 601; *Carstairs vs. Cochran,* 193 U. S., 10, 24 Sup. Ct., 318, 48 L. R. A., 596; *Hannis Distilling Co. vs. Baltimore,* 216 U. S., 285, 30 Sup. Ct., 326, 54 L. Ed., 482."

V.

THE SUPREME COURT OF PENNSYLVANIA, THE SUPERIOR COURT, AND THE COURTS OF NISI PRIUS OF SAID STATE, HAVE CONSTRUED THE ACT OF 1866 RELATING TO WAREHOUSE RECEIPTS, AND HAVE, WITHOUT EXCEPTION, SUSTAINED THE VALIDITY OF THESE BONDED DISTILLERY WAREHOUSE RECEIPTS, AND HAVE HELD THAT RECEIPTS OF THE CHARACTER AND FORM, AND ISSUED UNDER THE CIRCUMSTANCES OF THOSE IN CONTROVERSY HERE, ARE WAREHOUSE RECEIPTS WITHIN THE MEANING OF SAID ACT, AND PASS TITLE BY DELIVERY.

The warehouse receipts in controversy are documents of statutory origin and their force and effect involve the construction of a state statute.

The Act of Assembly of Pennsylvania of September 24, 1866, P. L. (1867), 1363; *Stew. Purd. Dig.* vol. 1, page 393, *inter alia*, provides:

> "Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce, petroleum or other commodities, stored or deposited with any warehouseman, wharfinger or other person in this state, or bills of lading, or receipts for the same, when in transit by cars or vessels to any such warehouseman, wharfinger or other person, shall be negotiable, and may be transferred by endorsement and delivery of said receipt or bill of lading; and any person to whom the said receipt or bill of lading may be so transferred, shall be deemed and taken to be the owner of the goods, wares and merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon; and no property on which such lien may have been created, shall be delivered by said warehouseman, wharfinger or other person, except on the surrender and the cancellation of said original receipt or bill of lading; or, in case of partial sale or release of the said merchandise, by the written assent of the holder of said receipt or bill of lading, endorsed thereon; *provided*, that all warehouse receipts or bills of lading, which shall have the words, 'not negotiable', plainly written or stamped on the face thereof, shall be exempt from the provisions of this act."

This statute has been construed and applied in many cases in this state.

The Supreme Court of Pennsylvania (in a case within its jurisdiction), and the Superior Court of the

State (in a case of which it had final appellate jurisdiction), have held that receipts issued by distillers for whiskey in a bonded warehouse (receipts of the exact description of those in controversy here), were warehouse receipts under said Act of 1866. Other Courts of the State have followed these decisions; no State Court has decided otherwise, and the trade has conformed its practices to such interpretations, and thereby established a uniform, unbroken custom, of long duration.

In *P. Keil et al. vs. L. H. Harris,* decided by the Supreme Court of Pennsylvania, November 15, 1886, 4 Sadler's Penna. Sup. Ct. Cases, page 201, 5 Cent. Rep., 865, it was held in a Per Curiam opinion:

> "The Whiskey in controversy, being in a bonded warehouse, was properly delivered by Vandergrift & Brother, by their certificate or bill of sale, to Miller, Forge & Company, under and by virtue of which the defendant claims."

The action was for damages for the conversion by defendant, Harris, of two lots of fifteen and twenty-five barrels of whiskey, respectively. Vandergrift & Brother were distillers at Fredericktown, Washington County, They sold the whiskey in controversy, which was stored in their own bonded warehouse, and delivered their own warehouse receipts with gauger's certificates for the same to the purchaser. The whiskey remained in said distiller's own bonded warehouse on storage. On a judgment against Vandergrift & Brother, the distillers and warehousemen, an execution was issued, and a levy made upon the whiskey in their bonded warehouse. The sheriff sold the whiskey and plaintiff purchased it at an execution sale. Defendant did not pay the tax and take the whiskey out of bond until a month later. The trial

judge directed a verdict for the defendant. In the Supreme Court, the point was distinctly made by appellant,—"A distiller is not a warehouseman within the meaning of the Act of Assembly of September 24, 1866 (Purdon's Digest, 145.) He is no more a warehouseman than is any other manufacturer who keeps a warehouse at his place of business, and in which he stores his product exclusively. A warehouseman, as contemplated by the Act of 1866, is a person who receives and stores goods as a business for compensation or profit. *Bucher vs. Com.*, 103 Pa., 528" (1883). Counsel for appellant further argued that under the Second Section of the Act of 1866, the issuance of a receipt by such distiller was contrary to the provisions of the Act and that the transaction for want of actual delivery was fraudulent and void as against execution creditors. Counsel for the appellee replied, referring to the Acts of Congress: "While the distiller is not wholly excluded from the warehouse, he is not allowed access thereto except in the presence of the storekeeper, who carries the keys and has charge and control of the warehouse. It is plain, therefore, that no actual delivery of the whiskey was practicable," etc.

No other question was presented to the Supreme Court in that case, except the proposition as to whether or not the Pennsylvania Act of 1866 authorized the issuance of such warehouse receipts.

Judge Archbald, in his opinion in this court, said:

"Neither is *Keil vs. Harris*, 5 Cent. Rep., 865, (1886) necessarily the other way. It was assumed in that case, that, by the deposit of the whiskey in the warehouse of the distiller, there was a bailment to the Government which, as we have seen, is not

so, and it is upon this mistaken assumption that the case proceeds. But, in addition to that, the defendant, who held the certificates which were sustained, had paid the tax on the whiskey and procured it to be delivered to him, against which the plaintiff had merely an attempted levy and sale."

Judge Archbald asserts that the Supreme Court of Pennsylvania made a mistake in assuming that the deposit of the whiskey in the warehouse constituted a bailment to the Government. The question is not as to the basis of the Supreme Court's decision, but as to what it decided. This Court has no power to analyze the reasoning of the Supreme Court of Pennsylvania by which that court under a statute of that state reached a conclusion sustaining the validity of distillery warehouse receipts, and then, because it does not approve of the reasoning, refuse to follow the decision. The case is binding upon this court irrespective of the soundness of the reasoning upon which it was based. This is not an appeal from its judgment. To further examine the grounds of their conclusion would be to nullify the rule making their decision binding on the Federal Courts. Moreover, Judge Archbald is himself mistaken when he says that the defendant had paid the tax and procured the delivery to himself against which the plaintiff had merely an attempted levy and sale. There was in fact a levy and sale under execution a month before the defendant paid the tax and procured the actual delivery of the whiskey to him. No rule had been taken to set aside the sheriff's sale, and the Supreme Court in its opinion ignores this immaterial fact and bases its decision squarely on the law of proper delivery by means of the warehouse receipts.

The Superior Court, in the case of *Sloan vs. Johnson*, 20 Pa. Super. Ct. Reps., p. 643, (1902) which was assumpsit on warehouse receipts issued by a distiller for whiskey stored in a distillery warehouse, in an opinion, delivered by Judge William W. Porter, July 10, 1902, said:

"This action is brought for the value of fifty barrels of whiskey. The plaintiff's claim is founded upon ten warehouse receipts issued by the defendant, who is a distiller and warehouseman.

* * * * * *

"By the provision of the Act of September 24, 1866, bills of lading and warehouse receipts are made negotiable and transferable by endorsement and delivery. The two documents are affected by the same provisions. The defendant contends that the act provides the only method of transferring title to the goods, namely, by endorsement and delivery of the document representing the goods, and that the absence of endorsement upon the receipts in this case, prevented the passage of title to Sloan. This position cannot be sustained. As to bills of lading, it has been held that where the intention of the parties is clear, delivery of a bill of lading without formal endorsement transfers the title to the goods: *Richardson vs. Nathan*, 167 Pa., 513; *Harrison vs. Mora*, 150 Pa., 481; *Holmes vs. German Security Bank*, 87 Pa., 525. No reason is apparent why the same rule should not apply to warehouse receipts. In the case before us, the plaintiff is uncontradicted in his proof that he paid value and received the receipts with intent by both parties that title should pass."

This case holds that the receipts issued by the distiller for whiskey distilled by and belonging to him stored in his own bonded warehouse, were warehouse receipts under the Act of 1866, and that the distiller was a warehouseman.

The Supreme Court of Pennsylvania, in the case of *Miller vs. Browarsky*, 130 Pa., page 372, affirmed the decision of the court below, upon the opinion of R. B. Petty, Esq., referee. In the course of that opinion Mr. Petty, in discussing warehouse receipts issued by a distiller for whiskey in a bonded warehouse, said:

> "As has already been stated, whiskey in bond cannot be actually delivered. It cannot be removed from the warehouse until the tax is paid, but under the law the tax must be paid and the whiskey withdrawn within three years from its entry. As is well known the traffic in bonded whiskey is a very large one and great quantities of bonded whiskey are sold. To hold that these sales would be invalid without actual delivery, would be to hold that a purchaser of bonded whiskey is entirely at the mercy of the distiller, and must trust entirely to his honesty; on the other hand, to hold that all that is necessary is to make a bill of sale, leaves it in the power of a dishonest distiller to sell the same whiskey to a half dozen purchasers, and thus defraud all but the first purchaser. Therefore, the general rule of equity should be applied, and the purchaser required to do all that can reasonably be done to give notice of his title and prevent a second sale.
>
> The testimony shows that the trade has adopted a system regulating the transfer of bonded whiskey by means of certificates called warehouse receipts. These certificates in addition to the cer-

tificates of the distiller that he has sold the whiskey, contain a statement signed by the United States gauger showing the numbers and dimensions of the barrels, the gauge and date of entry. It does not clearly appear that but one certificate of this character is signed by the gauger, but as the only purpose of these certificates is the sale and transfer of the title, the gauger by issuing more than one would be a party to a fraud. It is therefore probable that the gauger will sign but one certificate for each lot of whiskey."

Commenting on the decision in this case, Judge Archbald said in his opinion above referred to:

"Nor does the case of *Miller vs. Browarsky,* 130 Pa. 372, (1889) in any respect sustain the contrary view. The distiller there sold whiskey in his warehouse to the plaintiff, Miller, who took as evidence a receipted bill, but let the whiskey remain in the warehouse undisturbed for three years. And in the meantime the distiller executed certificates, in the form of warehouse receipts against a part of the same to a third party, who transferred them to the defendant, who, from time to time, furnished money to the distiller to pay the tax, and got withdrawal orders from the collector, on which the whiskey was removed. The death of the distiller brought the conflicting claims to light. The plaintiff sued the defendant in trover and conversion, but it was held that he had no case. The plaintiff, it was said, left the whiskey in the absolute control of the distiller, when, by reasonable precaution, by notifying the collector and the storekeeper of his claim, he might have put it beyond the power of the distiller to resell. It is

doubtful whether mere notice to the officers of the Government would have had that effect. But, however, that may be, the fact remains, that, notwithstanding the sale to the plaintiff, and the receipted bill given to him for the goods, which, being prior in time would be superior in right, if the matter was to go by receipts, it was held, that, as against the defendant, who advances money to get the whiskey out of bond, and took the goods, they were of no account."

This case decided that one who obtained a formal warehouse receipt with gauger's certificate attached was preferred in title over one who had nothing but a receipted bill. The case is express authority for the contention that the delivery by warehouse receipt was good and effectual in law against a prior purchaser who failed to obtain such evidence of title although he had paid the purchase price. In any event the decision recognizes the established rule in Pennsylvania that such certificates were warehouse receipts, the delivery whereof passed title to the holder.

Rosenham vs. Batjer, Appellant, 154 Pa., 544, (1893) was a case which involved the transfer of certificates of practically the same form as those in controversy here. They were issued by a distiller from his free warehouse. In a free warehouse, of course, there was no joint custody under the Federal statutes. This case was tried in the Allegheny County Common Pleas before Judge Ewing, who charged the jury, *inter alia,* as follows:

"It is claimed that the case of *Bucher vs. Com.,* 103 Pa., 528, decides that it is not within the Act of Sept. 24, 1866. [Speaking of such receipts.]

We do not think that that case rules this. That was a criminal case, and it was necessary to construe the statute closely, but in that case the form of receipt was entirely different, and the proof was that there was no compensation to be given for storage. Here, on the face of the receipt, Finch & Co. hold themselves out as warehousemen, and on the very face of the certificate there is a storage charge. My impressions are that it is within the act of assembly, and that where a man or a firm in this state hold themselves out as warehousemen, asserting that they are warehousemen, holding goods on storage for a charge, the public have a right to deal with them as such, and that the issuing of such a certificate is of itself an agreement that they are to be governed by the statute of Pennsylvania in relation thereto; and, if that is the case, the verdict should be for the plaintiffs. But it is not necessary, in my judgment, to decide that question in this case, because it seems to me that there is another question in the case which rules it."

He then proceeds to determine the case upon the question of estoppel. The judgment was affirmed by the Supreme Court, *Per Curiam*, January 3, 1893, without any opinion.

In the case of *Exchange Bank of Macon vs. Uhlman-Goldsborough Co.*, 18 Pa. C. C., 252, (1897) in Common Pleas of Dauphin County, in an opinion by Judge McPherson, receipts such as these in controversy here, issued by the Wilson Distillery Company on whiskey in their bonded warehouse, were held to be warehouse receipts negotiable by endorsement, citing as authority *Keil vs. Harris*, and *Miller vs. Browarsky, supra.*

Counsel have been unable to find a single case in the Courts of Pennsylvania—notwithstanding the fact that since the passage of the Act of 1866 hundreds of millions of dollars of said warehouse receipts have been issued and transferred—holding that these receipts were not warehouse receipts under said Act. It has been the universal custom of the trade, affecting hundreds of millions of dollars of such receipts, to treat these securities as warehouse receipts, and it would be difficult to estimate the amount of such securities that are today held by banks, dealers and investors.

If the decision of the Pennsylvania Courts is wrong or against public policy, it can be remedied by the Legislature. One who invests his money on the faith of such rulings, and finds his rights swept away by a subsequent ruling of the same court reversing its previous findings, may rightly complain of a grievous injustice:

Goelpke vs. Dubuque, 1 Wallace, 175 (1861).

Any one is entitled to rely upon such a decision whether based upon erroneous facts or erroneous law, or mixed questions of fact and law, or questions on the borderland between, and when the same question arises in respect of a transaction solely between citizens of the State of Pennsylvania—a Pennsylvania contract in short—the Federal courts should be most careful not to strike down rights *which the State courts would regard as vested.*

The original decision of this court in this case reversing *In re Miller Pure Rye Distilling Company,* 176 Fed., 606, (1910) startled and amazed the trade and their legal advisers.

It is submitted that there is a misapprehension of the power of the Federal Court, on the part of the learned district judge, who wrote that opinion, when he refers to *Keil vs. Harris*, 5 Cent. Rep., 856, (1886) and states:

> "It was assumed in that case that by deposit of the whiskey in the warehouse of the distiller there was a bailment to the government, which, as we have seen, is not so, and it is upon this mistaken assumption that the case proceeds."

Whatever mistaken assumption of law arising from the conception of the relations of the parties the Supreme Court of Pennsylvania may have had, or may have indicated in its opinion, this Court should not reverse the decision of that Court construing a statute of its own state. What controls is its decision. If it has construed the statute of the state, that is conclusive on the Federal Courts. It cannot be contended that the decision in *Keil vs. Harris* was not a specific construction of the statute. In fact no other question was before the Court. No better illustration of the rule of conclusiveness can be given than the case of *Zeiger vs. Pennsylvania Railroad*, 158 Fed. Rep., 809, (1908) decided by this Court. The Supreme Court of Pennsylvania, in construing the Fatal Accidents Act, held that the law did not apply to one who was not a citizen of the State. The reasoning of the court and the basis of the decision were upon mistaken assumptions, both of fact and law. That decision had been followed by only two states in the Union, and practically the courts of every other state, including several of the Federal Courts, have repudiated those mistaken assumptions. This was brought to the attention of this court by counsel, in an effort to induce this court to refuse to follow

that decision, but this court held that until that decision was reversed by the Supreme Court of Pennsylvania, the Federal Courts were bound thereby. And it was so held, notwithstanding the fact that it appeared that the courts in many jurisdictions had demonstrated the mistaken assumptions upon which the Supreme Court of Pennsylvania had acted. Any other rule would make the decision of the Supreme Court of the State of no conclusiveness. In each case there would be a re-examination by the Federal Court, in order to determine the reason and reasonableness of the decision. This would involve a re-examination and perhaps a different construction of the statute.

The foregoing argument is not intended as an admission that the Supreme Court of Pennsylvania was wrong. On the contrary, it is confidently asserted that it was right, as will be later argued in this brief.

As further interpreting the Act of 1866, resort may be had to the subsequent act of the legislature upon the same subject adopted March 11, 1909 (P. L. 19, sec. 1, vol. 5, Stew. Purd. Dig. 5254). This act repealed the Act of 1866.

> "In the interpretation of a statute, it is very well settled that the understanding of it evidenced by the legislature in subsequent enactments is to be treated as of great weight: *Folk vs. State Capital, etc., Assn.*, 214 Pa., 529, and cases cited at page 538."
>
> *National Union Bank vs. Shearer*, 225 Pa., 481.

(By a strange coincidence in the above case of *Bank vs. Shearer*, the Supreme Court of Pennsylvania was considering certain provisions of this very warehouse Act of 1866.)

The Act of 1909 provides that warehouse receipts may be issued by any warehouseman, and that such receipts shall indicate "if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly, or in common with others." The legislature thus clearly indicates its construction of warehouse receipts issued by warehousemen as comprehending and embracing cases where the warehouseman is issuing receipts for his own property,—property owned by himself "solely, or jointly, or in common with others."

In this connection, it may not be amiss at this time to suggest,—although the discussion may be more properly assigned to another place in this brief—that the apprehensions of this court as exhibited in the opinion of Judge Archbald as to the opportunities for fraud and the evil consequences that might follow, from allowing warehousemen to issue warehouse receipts for property of their own, in their own custody, are not shared by the legislature of Pennsylvania, nor by the commission on uniform state legislation which prepared the "warehouse receipts act" adopted by the State of Pennsylvania on the 11th day of March, 1909, nor by the legislatures of other states, which have likewise adopted said act. By the express terms of this recent act, warehouse receipts may be issued by any warehouseman for goods of his own, stored with himself, if the receipt states that it is issued for goods of which the warehouseman is owner, either solely or jointly, or in common with others. The question as to the extent to which actual delivery may be dispensed with as against creditors is a matter of public policy. There cannot be one public policy of the Legislature and another of the Courts in respect of the same subject matter.

"* * * The legislature, which generally determines what is and what is not public policy"

(*Erdman vs. Mitchel*, 207 Pa., 92, 1903) has now explicitly spoken on this very point, and its utterance is authoritative and conclusive.

The other cases in the Supreme Court of Pennsylvania in which the warehouse Act of 1866 is construed, (but not with reference to distiller's warehouses), namely, *Bucher vs. Com.*, 103 Pa., 528, (1883); *Bank vs. Jagode*, 186 Pa., 556, (1898); *Moore vs. Jagode*, 195 Pa., 163, (1900); and *National Bank vs. Shearer*, 225 Pa., 470, (1909), are not in conflict with its specific holding that warehouse receipts issued by a distiller for goods held in storage in his own bonded warehouse, under facts identical with the case at bar, are warehouse receipts under the Act of 1866.

In making the above statement it is not even necessary to rely upon the manifest fact that a bonded warehouse connected with a distillery, by reason of the United States governmental regulations, stands in an entirely different position from the various warehouses discussed in the cases above mentioned.

Bucher vs. Commonwealth was a criminal prosecution arising from the delivery of 366 bushels of corn to a dealer who issued a receipt for the corn "on store." The evidence was conflicting as to whether it was a contract of purchase, or a contract of storage. There was nothing in the receipt to indicate that Bucher held himself out as a warehouseman, or pretended to be a warehouseman, or that the receipt pretended to be a warehouse receipt, except the words "on store" at the end of the receipt, which read: "Received of J. Hettrick, per Kost, 366 48-56 bushels of corn on store. R. A. Bucher." The Supreme Court said in passing upon this receipt, Bucher

having been prosecuted as a warehouseman for appropriating the corn:

> "We must have regard to whom and to what the Act is intended to refer, and to nothing else. It expressly indicates 'warehousemen, wharfingers and other persons,' and by 'other persons' we must of course understand those who are engaged in a like business, or who may connect the business of warehouseman or wharfinger with some other pursuit, such as shipping, grinding or manufacturing. So the goods stored or deposited must be so stored or deposited, with the intention that they shall be returned without change or substitution, or in a manufactured state, to the owner or his transferee."

It is submitted that there is nothing in this statement which conflicts with the contention that the distiller may establish a warehouse in connection with his distillery. On the contrary, the court states that one may connect the business of warehouseman or wharfinger with some other pursuit, such as shipping, grinding or manufacturing. This would include a distiller who connected the business of warehouseman with his business as a manufacturer or distiller of whiskey.

In *Bank vs. Jagode*, a wool dealer made a pretense of keeping a warehouse by making a lease to one of his clerks, of a portion of certain premises. The possession, custody and control of the goods in the alleged warehouse as was shown, were at all times not in the clerk,—the alleged warehouseman,—but in the wool dealer, who appropriated the goods in controversy, notwithstanding the fact that the clerk had issued therefor alleged warehouse receipts. The Supreme Court said:

> "On these facts it is perfectly clear that there was no real warehouse at all in the case and that

Turtle was a mere employe or man of straw used by the Keen-Sutterle Company to cover their own operations with their own goods."

In the course of the opinion, in discussing the Act of 1866, Justice Mitchell said:

"Nor does the act define a warehouse or a warehouseman, but uses the latter word in connection with 'wharfinger or other person' (*ejusdem generis, Bucher vs. Com.,* 103 Pa., 528), in its ordinary signification of one who carries on the business of receiving and keeping goods on storage for the owners, for compensation. The act prohibits the issue of a receipt unless the goods shall have been actually received into store or upon the premises of the warehouseman; the issue of any second or duplicate receipt while the first is outstanding, without writing the word duplicate across the face of the second; the delivery of any goods receipted for except on surrender of the receipt; and the sale, encumbrance, etc., by the warehouseman of goods receipted for. These provisions plainly contemplate that the warehouseman shall be one engaged in the business, and also that he shall be another than the owner of the goods. A large part of the security of the holder of the receipt for the actual production of the goods when called for is the business, interest and good faith of the warehouseman, and the penal consequences of any breach of duty by him. This security would be greatly diminished, if not rendered worthless, if any owner could choose to say his goods were on storage with himself and issue receipts which should pass from hand to hand for value, while the goods remained under his own control, or subject to levy by his creditors."

The case of *Moors vs. Jagode, supra,* arose out of practically the same state of facts, and in an opinion delivered by the same justice, it is said:

> "We had occasion to consider the Act" (the warehouse act of 1866) "in *Bank vs. Jagode,* 186 Pa., 556, and it was there held that the receipt must be one issued by a *bona fide* warehouseman, and the mere holding himself out to the world or general repute is not sufficient if he is not such in fact."

It might be a sufficient answer to say that much of the opinion of the court quoted is mere *dicta,* not necessarily involved in the decision of the question before the court; the case before the court being such a palpable fraud, and the evidence showing so clearly that the clerk was not a warehouseman, as the Court found.

But it is not necessary to rest on this always more or less unstable ground of discrimination, though it is important in considering the language of a court, to determine whether it is a decision of a specific question submitted, or a mere argument in the opinion. The former is always so much more carefully weighed and balanced than the latter.

It is submitted that what the court meant to convey by the statement: "These provisions plainly contemplate that the warehouseman shall be one engaged in the business, and also that he shall be another than the owner of the goods," was, that the warehouseman, *without maintaining a warehouse for the storage of goods* (the very element wanting in that case), could not issue a warehouse receipt *to himself,* being the owner of the goods stored with himself. This state-

ment of the court can have no application to the case at bar, (a) because here there was a warehouseman engaged in the business of storing for profit; (b) because while the warehouse receipt was issued by the warehouseman to himself, such receipt was at once transferred to the bank and the bank was thereafter the owner of the whiskey. The receipt was the vehicle of transfer; (c) because by the terms of the note the distiller recited "having deposited with the said bank as collateral security 200 bbls. whiskey in bonded warehouse at Womelsdorf, Pa.," which was practically a conveyance of the whiskey to said bank.

A distiller having sold the whiskey to a purchaser, and the purchaser having obtained delivery of the whiskey, could then deliver the whiskey to the warehouse, kept by the distiller, and the warehouse receipt issued therefor would then be perfectly good and valid as a warehouse receipt. If it be said that this illustration involves in the first instance actual delivery to the purchaser, which completed his title, but this was wanting in the case at bar, and such want of delivery, is what makes the sale void under the laws of Pennsylvania, it may be replied: This answer begs the whole question now under discussion, and to which reference will be made later. Surely the Supreme Court of Pennsylvania may be presumed to have been familiar with its own numerous decisions, many of which were cited to it in *Keil vs. Harris,* on the necessity of delivery to complete title, and of its like numerous decisions on the exceptions to such necessity of delivery, and to have had in mind both the rule and the exceptions, when in *Keil vs. Harris,* it decided that the delivery of the warehouse receipts was a good delivery, passing title. The statement in that opinion (to which Judge Archbald

referred as reason for this Court reversing the decision, or rather refusing to follow it): "It is well settled that where personal property is in the hands of a bailee, a transfer by bill of sale alone is good and valid even as against the creditors of the vendor," was only a selection of one of the execptions. There are numerous others. It might have been followed by some general statement of the rule,—as for example, "So, too, where for any other reason actual delivery is impracticable a transfer by bill of sale is good and valid," etc. At any rate the Supreme Court had in mind the necessity for delivery and the exceptions to such necessity when it decided *Keil vs. Harris.* It doubtless treated the joint control of the United States revenue officers and the regulations affecting the warehouse as sufficient to bring that case under the exception. But in any event, until or unless the case is overruled by the Supreme Court of Pennsylvania, it is binding upon the Federal Courts as the correct exposition of the law of this Commonwealth.

In the case of *National Union Bank vs. Shearer,* 225 Pa., 481 (1909), the receipts were held to be warehouse receipts. The tobacco was stored in a building constructed and intended to be used as a cigar factory. While waiting for a tenant the party took on storage a certain quantity of tobacco and issued a number of warehouse receipts for the tobacco. The court held him to be a warehouseman under the Act. Said Mr. Justice Brown:

> "The Act of Sept. 24, 1866, P. L. (1867), 1363, making warehouse receipts negotiable, does not define a warehouseman, and there is nothing in it requiring him to hold himself out to the general public as such. We have defined him to be 'one

who receives and stores goods as a business for a compensation or profit:' *Bucher vs. Com.*, 103 Pa., 528; *Tradesmen's Nat. Bank vs. Jagode*, 186 Pa., 556. There was sufficient evidence for the finding by the jury that the appellant was a warehouseman within our definition of the term as used in the act of 1866, and the learned and careful judge below properly so held in his opinion overruling the motion for a new trial and refusing judgment for the defendant *n. o. v.* On that opinion which clearly and correctly disposes of the questions raised on this appeal I am directed by the court to affirm the judgment."

Applying the tests in every one of these cases, the receipts in controversy here fulfill every requirement of these decisions. First. The distiller had a separate and distinct warehouse (compelled so to have by the Federal Statutes under very strict provisions, prohibitions and penalties). Second. He held himself out to the world as a warehouseman. Third. He stored goods for compensation. The only possible difference between such a warehouse and a public warehouse, was this: This warehouse stored only whiskey, which this distiller had manufactured and sold, and some perhaps which he had not sold, but still owned, instead of storing any kind of goods for anybody. There is nothing in the act and nothing in the decisions which prevents a warehouseman from limiting his business to the storage of any particular kind of merchandise; for example, grain, whiskey, butter, eggs, iron, etc. It is an every-day fact well known, that warehousemen do limit their business to particular branches of trade.

The decisions of the courts of other states on receipts issued by distillers for whiskey kept on storage in

the bonded warehouses confirm the Supreme Court of Pennsylvania. While it is submitted, that even if every other state in the Union had decided otherwise, still this Court is bound by the decision of the State Supreme Court construing the statute of its own state, yet as the soundness of the decision by the Pennsylvania Court has been questioned, it is of interest to note that it is sustained by the courts of other States.

Wherever the question has been raised it has, almost without exception, been decided by the courts of other States that such receipts or certificates were warehouse receipts.

In *Newcomb, etc., vs. Cabell,* 73 Kentucky, 460 (1874), a distiller sold whiskey stored in his warehouse, and delivered to the purchaser a certificate signed by himself as proprietor of the warehouse. Creditors of the distiller attached the whiskey in the warehouse before it was transported and after it was paid for. It was held that the whiskey was sufficiently identified and the sale was absolute, passing the title to the purchaser by the symbolical delivery of the warehouse receipt.

It was said by Judge Pryor:

"The possession of the whiskey having been delivered at the time of the sale, and before the actions by the appellees were instituted, the question of constructive fraud does not arise. The right of property had passed, and also the possession. It is true that the whiskey was not taken hold of by the appellants or removed from the warehouse at the time of the sale, for the reason that the manual possession was not with the vendor. * * * It would be carrying the doctrine of constructive

fraud to such an extent as would virtually prohibit all such sales to hold the manual possession of the property in a case like this is necessary to avoid the effect of a doctrine that, in the language of Chief Justice Robertson, 'is generally felt and admitted to be scarcely less consistent with sound policy than the harmony of legal science.' *Daniel vs. Morrison*, 6 Dana, 185.

The actual possession of the whiskey was really with the storekeeper as the agent of the Government, and the actual possession being in another than the real owner, the doctrine of constructive fraud does not apply. The party holding the property becomes, by reason of the sale the bailee of the vendee: (*Robbins vs. Oldham*, 1 Duvall, 29); *Butt vs. Caldwell*, 4 Bibb., 458."

In *Kessler vs. Veio*, 142 Mich., 471 (1905), defendants, retail liquor dealers, wrote offering to buy ten barrels of whiskey. Plaintiff accepted by letter; then segregated the ten barrels in their bonded warehouse, issued warehouse receipts and an invoice therefor, which were sent to defendants with two of the barrels of whiskey. The other eight barrels remained in the warehouse. The whiskey was supposed to be a certain proof. Dispute arose over the proof of this whiskey and defendants refused to pay, except for the two barrels that they had received and used. It was held:

"The delivery of the warehouse receipts was a sufficient delivery to pass title. Actual delivery is not essential to transfer title to property sold. *Rail vs. Lumber Co.*, 47 Minn., 422; *People vs. Sheehan*, 118 Mich., 539. * * * Where the agreement is on the part of one to sell and the other to buy a specified article, 'the title passes to the

purchaser at once, unless the terms of the contract indicate the intention to have been otherwise, and delivery is not essential to the passing of title as between the parties and their privies.' *People vs. Sheehan, supra.* * * * The letter and documents accompanying it were a notice to the defendants that the property had been set aside and designated as their property, and subject to their control. They could have sold and transferred the warehouse receipts, and thereby conveyed a valid title to the property therein described. *Bank of Detroit vs. Hibbard,* 48 Mich., 123; *First Nat. Bank of Green Bay vs. Dearborn,* 115 Mass., 219; *Sec. Nat. Bank of Toledo vs. Wallbridge,* 19 Ohio St., 419; 30 *Amer. and Eng. Enc. Law* (2d ed.), 71."

This case was followed by the same court in:

Kessler vs. Zacharias, 145 Mich., 698 (1906);
Kessler vs. Lackey, 146 Mich., 384 (1906).

See also the following cases involving warehouse receipts for whiskey, which have been decided in states other than Pennsylvania:

State Bank vs. Waterhouse, 70 Conn., 76 (1897).

Greenbaum Bros. & Co. vs. Megibben, 73 Ky., 419 (1874).

Anheuser-Busch Brewing Assn. vs. Daviess County Distilling Co., 49 S. W. Rep. (Ky.), 541 (1899).

Cochran & Fulton vs. Ripy, Hardie & Co., 13 W. P. D. Bush (Ky.), 495 (1877).

Young vs. Lambert, L. R., 3 Priv. Council App., 142 (1870).

United States vs. 36 Barrels of High Wines, 7 Blatch. Cir. Ct. Rep., 459 (1870).
United States vs. Witten, 143 U. S., 76 (1891).
Conrad vs. Fisher, 37 Mo. App., 352 (1889).

In speaking of the latter case Judge Archbald said:

"And in *Conrad vs. Fisher,* 37 Mo. App., 352, where, as here, a distiller, in the attempt to create a pledge, issued receipts against whiskey in bond in his own warehouse, that the receipts were not good."

An examination of this case will show that it was decided under a statute of the State of Missouri relating to chattel mortgages requiring actual delivery or recording. The syllabus of the case was prepared by Judge Thompson, who delivered the opinion of the court, and in paragraph 7 thereof, he says:

"The owner of goods stored in his own warehouse cannot make a valid pledge of them, by issuing to another an instrument in the form of a warehouse receipt, in which he professes to hold the goods for that other. Such an attempt to create a pledge is void, as being contrary to the provisions of our statute relating to chattel mortgages, which requires a delivery of possession or a recording in the office of the recorder of deeds. (R. S. 1879, sec. 2503.)"

And this same case holds, in paragraph 5 of the syllabus, that:

"Where, from its situation, personal property is not susceptible of actual delivery, manual delivery is not essential to the creation of a pledge;

it may be created by a symbolical delivery,—as by the delivery of a bill of parcels and a warehouse receipt."

This case was originally argued before Buffington and Lanning, Circuit Judges, and Archbald, District Judge, Judge Archbald writing the opinion, Judge Lanning concurring in a separate opinion, Judge Buffington writing a dissenting opinion. This decision reversed Judge McPherson of the District Court of the Eastern District of Pennsylvania. (176 Fed., 606.) In *Boarts, Trustee, vs. Selden & Co.*, Orr, District Judge, Western District of Pennsylvania, decided the case in the Court below, coming to the same conclusion on the Pennsylvania law as did Judges Buffington and McPherson. On the reargument Judge Lanning concurred with Judges Gray and Buffington. We therefore have no Pennsylvania judge except Judge Archbald who has held that the delivery by these receipts was not a good delivery.

If the foregoing proposition,—to wit: the Supreme Court and the subordinate courts of the State of Pennsylvania have construed the Act of 1866, as applicable to the warehouse receipts in controversy here—be true, then under the authority of the Supreme Court of the United States, this court is bound by that construction, and must follow the same.

VI.

THE INTERPRETATIONS OF A STATUTE OF THE STATE OF PENNSYLVANIA BY THE HIGHEST COURTS OF THAT STATE ARE BINDING UPON THIS COURT AND ARE ACCEPTED BY ALL FEDERAL COURTS AS CONCLUSIVE AS TO THE MEANING OF THE STATUTE, EVEN IF, HAD IT BEEN A CASE OF FIRST IMPRESSION, THE FEDERAL COURT MIGHT HAVE DIFFERENTLY CONCLUDED.

It is well established that the construction of a state statute by the highest court of the state is accepted by the federal courts, as conclusive as to the meaning of the statute. This has been decided by the Supreme Court of the United States in a number of cases.

In *Mo., Kan. & Tex. Ry. Co. vs. McCann,* 174 U. S., 580, 586 (1898) it was said:

> "But the elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof."

And again, in *Noble vs. Mitchell,* 164 U. S., 367, 372, (1896):

> "Manifestly the interpretation of a statute of the State of Alabama by the Supreme Court thereof under the circumstances here presented is binding on us."

In the case of *New York, Lake Erie & Western Railroad Company vs. Pennsylvania*, 158 U. S., 431, (1894), the court had occasion to consider a Pennsylvania statute imposing a tax upon tolls. The Supreme Court of Pennsylvania had defined the word "tolls" as used in the tax laws of that State. The court (commencing at the foot of page 435), said:

> "A construction or meaning attributed to the terms of a state statute by the courts of such state will, of course, be adopted by this court when called upon to decide questions arising under such legislation."

In *Branch of State Bank of Ohio vs. Knopp*, 16 Howard, 375, 391, (1853) the court said:

> "The established construction of a statute of the state is received as a part of the statute."

In *Whitman vs. Atkinson*, 130 Fed. Rep., 759, 761, decided April 26, 1904, the Circuit Court of Appeals for the Second Circuit, construing a Kansas statute, said:

> "The interpretation becomes a part of the law of that state, as much so as if incorporated into the body by the legislature. *Christy vs. Pridgeon*, 4 Wall., 196."

Adopting these principles, this Court said of a decision by the Supreme Court of Pennsylvania in *Zeiger vs. Pennsylvania Railroad Co.*, 158 Fed. Rep., page 809, (1908) in a case argued before Dallas, Gray and Buffington, Circuit Judges—opinion by Judge Dallas:

> "It put a construction upon the statute, and we are 'no more at liberty to depart from that construction than to depart from the words of the

statute.' * * * The construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States: *Elmendorf vs. Taylor*, 23 U. S., 158; 6 L. Ed., 289."

It is submitted, therefore, that under the principles established by these cases, this court is bound by and must follow the construction placed by the Supreme Court and followed without exception by the subordinate courts, of the State of Pennsylvania, upon the Act of 1866, and hold that the receipts in controversy here are warehouse receipts under said act.

The trade and the public have relied upon these decisions. Great quantities of whiskey have been bought and sold or pledged in reliance thereon. Millions of money is today invested in whiskey or loaned on the security thereof, the only evidence of title being warehouse receipts of the character of those involved in this case.

In conclusion, it is respectfully submitted:

1st. That the courts of Pennsylvania have decided that certificates for whiskey of the form and character in controversy, issued by distillers from their bonded warehouses, are warehouse receipts under the Act of 1866, and that this court and all Federal courts are bound to follow that interpretation of its own statute by the courts of this state.

2nd. That the law of Pennsylvania requiring actual delivery of personal property when sold or pledged,

does not require such delivery under any and every condition, but has well-established and recognized exceptions, applicable to the facts of this case. The purpose of the transaction was manifestly fair and honest, and the end to be accomplished by the pledge was promoted by the retention of possession by the pledgor. The goods were in process of manufacture, and therefore of necessity it was impractical to deliver the same. The whole transaction was in accordance with the usages and customs of the trade; the transferring of actual possession being impossible, without great shrinkage in value, loss of valuable rights and guarantees, and incurring payments of taxes, interest and other charges. The goods on storage were, for the time being, actually in the physical possession and exclusive control of others than the pledgor. The presumption of constructive fraud on account of these facts is clearly and conclusively rebutted, and constructive delivery such as was made by the deposit of these certificates was legal and effective under the law of Pennsylvania.

This rule in Pennsylvania, that a vendor's retained possession unexplained, is a constructive fraud, would not declare this transaction fraudulent, under the facts here shown. The rule, if it so declared, would be unreasonable, unbending and unjust, a mere artificial device more productive than preventive of fraud.

As was said by Judge Dean:

"But, in the long line of cases following it, step by step, the rule has been so softened, that now it may be said, with few exceptions, where the purpose of the contracting parties was, as between themselves, an honest one, and there was no concealment as to creditors of its true nature, the con-

tract is not constructively fraudulent; in other words, the law will be slow to hold the parties scamps, constructively, if the contract in view of its purpose, was actually an honest one."

The great inconvenience and enormous loss to the trade by overturning its long-established usage and custom, ought not to be inflicted unless the law authoritatively, imperatively and incontrovertibly so commands.

Respectfully submitted,

LAWRENCE MAXWELL,
THOMAS IAEGER SNYDER,
PHILIP S. ZIEBER,
A. LEO. WEIL,
Attorneys for Appellee.

LAWRENCE MAXWELL,
A. LEO. WEIL,
Of Counsel.

APPENDIX.

Pattison vs. Dale et al., 196 Fed. Rep., 5—115 C. C A., 115. (Circuit Court of Appeals, Sixth Circuit, April 11, 1912). No. 2172:

"1. Internal Revenue (Sec. 24)—Distillery Warehouse—Stored Liquors—Rights of Owners.

Where distilled liquor is stored in a distillery warehouse under control of the collector of the district and in charge of the internal revenue storekeeper as provided by U. S. Comp. St., 1901, pp. 2122-2124, Secs. 3271-3274, *et seq.*, providing for a joint custody of the warehouse by the distiller and the storekeeper, the distiller's surrender of control does not divest his title nor prevent his dealing with the property subject to the paramount rights of the government."

"2. Warehousemen (Sec. 15)—Pledges—Whiskey in Distillery Warehouses.

U. S. Comp. St., 1901, p. 2130, provides that, as spirits are received in a distillery warehouse, the gauger or storekeeper must place on the head of each barrel an engraved stamp signed by the collector or storekeeper and gauger, showing number of proof gallons, name of distiller, date of receipt in the warehouse, and serial numbers of barrels in progressive order, and that no two or more casks or packages warehoused in the same distillery shall be marked with the same number. Held, that where, after spirits had been deposited in a distillery warehouse and properly marked as provided, the distiller pledged a certain number of barrels specifically designated by number, by issuing warehouse receipts, to the pledgee therefor, describing particular barrels by number, number of wine gallons, the date when made, and the number of ware-

house stamp, etc., and thereafter became a bankrupt, he thereby effectively created an equitable lien in favor of the pledgee, the validity of which neither he nor his trustee could be heard to deny."

Pattison vs. Dale, 196 Fed. Rep., 5, 115 C. C. A., 115 (Cir. Ct. of Appeals, 6th Circ., 1912). Warrington, C. J.:

"The legal effect of the warehouse documents must be tested by the government's custody and control of the warehouses and whiskey, and the necessity of the situation so created.

[1] As to the warehouses: The distiller is bound to provide a warehouse on his distillery premises for the storage of distilled spirits of his own manufacture until the tax is paid. When approved and reported on by prescribed federal officers, it becomes a 'bonded warehouse of the United States, to be known as a distillery warehouse' and is placed 'under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper * * *' (*U. S. Comp. Stat.*, 1901, p. 2122, Sec. 3271), and 'in the joint custody of the storekeeper and the proprietor thereof,' but must be kept securely locked and not opened except 'in the presence of such storekeeper;' and no articles shall be received in or removed from such warehouse 'except on an order or permit addressed to the storekeeper and signed by the collector' (page 2124, Sec. 3274). As the spirits are received in the warehouse, the gauger or storekeeper must place upon the head of each barrel an engraved stamp signed by the collector, or storekeeper, and gauger, showing number of proof gallons, name of distiller, date o receipt in

warehouse, and serial numbers of barrels in progressive order, and 'no two or more casks or packages warehoused at the same distillery shall be marked with the same number,' (page 2130, Sec. 3287); the distiller is required within five days after the first of each month to enter the spirits for deposit, and give bond for payment of the tax before removal (page 2133, Sec. 3293); the tax must be paid by the distiller 'within eight years from the date of the original entry for deposit' (page 2110, Sec. 3251). Spirits may on payment of the tax be withdrawn from the warehouse on application to the collector (page 2135, Sec. 3294); the gauger must on receiving the collector's order gauge the spirits in the presence of the storekeeper before removal (pages 2133-2135, Secs. 3294, 3295); removal of spirits on which the tax has not been paid is forbidden under severe penalties of fine and imprisonment (page 2136, Sec. 3296).

According to the dates of the warehouse documents, the whiskey in question was made in February, March, and April, 1906, and presumably was stored in those months; it might remain there until the corresponding months of 1914.

Examination of these statutory provisions will show them to be very comprehensive. The government requires distillers to furnish distillery warehouses of the kind in question, subject to approval of the Commissioner of Internal Revenue. It has placed them under the direction and control of collectors and in immediate charge of storekeepers with the keys. It has through severe penalties guarded against removal of whiskey until the tax is paid. While these means of control and protection do not divest the distiller of title to

either warehouse or whiskey, it is plain that during the time of storage he is made to surrender the dominion and control of an owner. This is none the less true because the 'duty which the revenue officers owe in regard to the security of the warehouse and the safe-keeping of the spirits therein' is to the government. *United States vs. Witten,* 143 U. S., 76, 79, 12 Sup. Ct., 372, 373, 36 L. Ed., 81. Nor is such surrender of dominion and control affected by the joint custody of the warehouse that is given to the storekeeper and proprietor. His property is so exclusively held and dominated by the government, that not even his creditors can seize it through attachment or other process. *McCullough, Jr., vs. Large* (C. C.) 20 Fed., 309, 312; *Conrad vs. Pacific Ins. Co.,* 31 U. S., 262, 280, 8 L. Ed. 392. It is not a sufficient answer to say, as is earnestly contended by one of learned counsel, that the distiller avails himself of his 'right of ownership, possession, or control to inspect and repair the cooperage and to regulate temperature in the warehouse,' because he cannot enter or do these things except in presence of the storekeeper. The distiller cannot remove the spirits except on application to the collector and payment of the excise tax. And, aside from removal to other places of storage under formalities and bond (which practically preserve the government's power and control), there is no apparent object of removal during the aging process. The manifest purpose of allowing the spirits to be stored eight years is to enable the distiller to postpone payment of the tax until the spirits ripen into whiskey and so become fit for market. The cost of producing whiskey obviously requires either

the possession of capital, or the means of obtaining it, during this waiting period. Just how much time is so required does not appear, but it is common knowledge that several years must elapse before the spirits can be marketed to the best advantage of the distiller.

[2] As to pledge: We thus reach the controlling question whether this inevitable situation so far removes the product from the control of the distiller as to enable him to pledge or otherwise charge his interest in it. To state the question more specifically: Can it be rightly predicated of this situation that the change of physical possession and control which takes place between the distiller and the government furnishes a basis for the distiller, through constructive delivery made in virtue of the title remaining in him, either to effect the change of possession requisite to a pledge or to create its substantial equivalent by equitable lien? It is a familiar doctrine that possession is of the essence of a pledge, but that such possession may be constructive instead of actual. Any consideration of the subject must take into account the nature of the thing designed to be pledged. If it be capable of manual delivery, the means of effecting a change of possession are simple; if not, resort is had to constructive delivery. Constructive delivery is controlled by the necessity of the case. The object is to put the pledge under the power and control of the pledgee. Are the custody and control of the government an adequate substitute?

In *Casey vs. Cavaroc*, 96 U. S., 467, 477 (24 L. Ed., 779), it was held that placing with its president bills and notes belonging to a bank for

deposit with a firm (of which the president was a member) in pledge to secure a loan made to the bank (and the president turned the securities over to an employee of the bank and they were in fact used by the bank) was not such a change of possession as was necessary to create a privilege by the law of Louisiana; Justice Bradley saying:

'The difference ordinarily recognized between a mortgage and a pledge is that title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge. * * * The possession need not be actual; it may be constructive, as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security—that of mortgage and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession.'

The cases of *Union Trust Co. vs. Wilson,* 198 U. S. 530, 25 Sup. Ct. 766, 49 L. Ed., 1154, and *Security Warehousing Co. vs. Hand,* 206 U. S., 415, 27 Sup. Ct., 720, 51 L. Ed., 1117, 11 Ann. Cas. 789, furnish illustrations of what conditions will, and what will not, be regarded as sufficient to exclude

the owner from control of goods capable of delivery, which he owns and desires to pledge. In both cases, the place of storage was part of the structure of the pledgor. In the first case, the facts justified the conclusion that a change of possession was wrought; but the facts of the second case induced the court to characterize the scheme as a 'mere pretense, a sham.' This court in *Re Cincinnati Iron Store Co.*, 167 Fed., 486, 492, 93 C. C. A., 122, 128, held that the fact that pledged iron was stored with distinct marks to identify it on the premises of the pledgor, and placed in the custody of one of its employes, did not invalidate the pledge, 'provided the possession was actually changed from the pledgor to the pledgee, and the pledgor's dominion over the property otherwise removed.' Again, in *Hurley vs. Atchison, Topeka & Sante Fe Ry.*, 213 U. S., 126, 134, 29 Sup. Ct. 466, 469 (53 L. Ed., 729), where a mining company had contracted to mine and deliver coal sufficient to meet the current needs of the railroad company, but through financial embarrassment was unable to do so, and in order to enable the mining company to keep its agreement the railroad company furnished the mining company with money in advance of the agreed times of payment, it was held that this implied 'a purpose that the coal as mined should be delivered, and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement.'

The decisions mentioned are amply illustrative of the general law respecting the necessity of change of possession to sustain a pledge, where the pledgor's custody and control admit of such change. It is manifest, however, that there are marked dif-

ferences between the facts of those cases, also of their class, and the facts of the instant case. True, the government is not a bailee of the whiskey, in the sense that it has issued or would issue warehouse receipts to the distiller. Nor is it responsible to the distiller's pledgee as agent or otherwise. But there is a union of interests in the government and the distiller that is important. The distiller, as stated, requires time both to age his whiskey and pay the excise tax. The government exacts custody and control of the spirits as a condition of granting the time. The duration of these conditions—this isolation and environment—extends into years. It results that the whiskey product becomes an object of recognized value. Is there no lawful way to utilize this value as security?

The present warehouse documents were executed and issued by the distiller. They each apparently bear the signature of a United States gauger, indicating that he gauged the whiskey described in the receipts; but there is nothing in the record to show that the original receipts in fact bear his signature. If the gauger did sign them, such act could only amount to an individual statement of the presence of the whiskey; it would not bind the government. But it is admitted that Rohrer manufactured the whiskey and stored it in the warehouse, and we need not consider that feature of the case. There is much controversy, however, touching possession of the whiskey; Pattison claiming that it is in the government, and the trustees that it was in the distiller and is now in them. This results in contention on the part of the trustees that the distiller was nothing more than

his own warehouseman respecting his own warehouse receipts. The argument assumes the question. It treats Rohrer's relations to the warehouse and whiskey precisely as if his custody and control were absolute and exclusive. It will not do to say either that he was in actual possession, or that he could (without paying the tax and losing the opportunity given to age the spirits) effect a physical change of possession. *Union Trust Co. vs. Wilson, supra,* 198 U. S., 537, 25 Sup. Ct., 766, 49 L. Ed., 1154. The most that he could do was, in virtue of his title, to give constructive possession through symbolic delivery; and then only subject to the rights of the government. And this seems to be just what he attempted to do; for the receipts were given in 'conformity' with the laws of the United States, and each contains an argeement that the pledgee shall supply the money to pay the excise tax.

It is urged that the distiller's power through payment of the tax to defeat the attempted pledge reduces the transaction to one of personal obligation alone of the distiller, and in effect destroys the security altogether. Illustration of this is said to be furnished by the fact, admitted in this case, that 590 barrels of the 800 attempted to be pledged were sold and removed from the warehouse by Rohrer without the knowledge of Pattison. Serious as this is, it does not seem to be decisive. It must be conceded that it tends to limit the desirability and value of the whiskey as security. But this does not prove that there was no pledgeable interest in the whiskey. One test of this may be seen in the apparent right of the pledgee, through seasonable and proper judicial proceedings, to pre-

vent the distiller from exercising his right of withdrawal upon showing his purpose to convert the pledge. It would hardly be claimed that because an agent acting as custodian of a pledge, or because a regular warehouseman, had wrongfully surrendered or otherwise disposed of the pledge to the damage of the pledgee, his fraud would operate to overthrow the settled law sanctioning pledges so made. Nor is the claim tenable that the whiskey gave credit to the distiller, and the pledge operated to defraud his general creditors. The whiskey was not visible. The public had no access to the warehouses. *Taney vs. Penn Nat. Bank,* 187 Fed., 703, 109, C. C. A., 437 (C. C. A. 3rd Cir.); *Union Trust Co. vs. Wilson, supra,* 198 U. S., 538, 25 Sup. Ct., 766, 49 L. Ed., 1154. It is said all trouble could have been avoided by storing in general bonded warehouses. This may be assumed; but it would apply to all distillers, and yet it is not shown that such warehouses are at all adequate. Their selection is within the discretion of the Commissioner of Internal Revenue, and but few of such warehouses seem to have been provided. The possibility, however, of obtaining greater safety and better security, does not answer the question whether whiskey in distillery warehouses is susceptible of valid pledge.

The present transactions took place in Ohio. There is no statute of the state that appears to affect the present question. In *Thorne vs. Bank,* 37 Ohio St., 254, it was held in respect of hams in the exclusive custody and control of the owners, which apparently could have been changed to the creditor, that (syllabus):

'An instrument in the form of a warehouse receipt executed by a debtor to his creditor, on property owned by the debtor, who is not a warehouseman, for the sole purpose of securing such creditor, is void as against other creditors, where the property remains in the possession of such debtor.'

The case of *Hunt vs. Bode, Assignee,* 66 Ohio St., 255, 64 N. E., 126, presents facts different from those in *Thorne vs. Bank* and recognizes the principle that the delivery must be such as the nature of the case admits. The owner of warehouse receipts representing whiskey stored with a warehouseman, delivered them in pledge to a bank, and while the bank was in possession of the receipts the owner pledged his equity in them to another, gave notice of his action to the bank, and it accepted. In the first paragraph of the syllabus it is stated:

'A written pledge or transfer of an interest in warehouse receipts, or choses in action to secure a debt is valid, without actual or manual delivery, where such receipts or choses in action are being held by another creditor on pledge as collateral security for a loan of money made by him to the same pledgor, or transferror, the second pledge or transfer being equivalent to actual delivery of the property pledged or transferred; and a request by the pledgor or transferror to his first pledgee, that when his debt is paid he deliver the collateral to his other creditor, constitutes sufficient possession of the collateral by such other creditor.'

The pledgee of the equity never had actual possession of either the warehouse receipts or the whiskey

represented by them, and yet the transaction was treated as constituting 'sufficient possession of the collateral by such other creditor.' This result was reached, as pointed out in the opinion, through the intent of the holder of the equity to deliver possession so far as the nature of the situation would permit. Thus it was said (page 269 of 66 Ohio St., page 128 of 64 N. E.):

> 'It is the application of the familiar rule that the transfer is complete and delivery made, when the owner has done all that he can do in the premises, and has given such possession to the pledgee or transferee as the nature of the property and its situation will permit. * * * This was all the delivery that could then be made, and it was at least a constructive delivery, and this we think meets the demands of the law.'

The principle so recognized is settled; indeed, it is the basis of smybolic delivery. We may add some illustrations to those mentioned earlier herein, ending with that found in *Hurley vs. Atchison Topeka & Santa Fe Ry., supra,* which related to unmined coal. See 2 *Kent's Com.,* (13th Ed.), pp. 500, 501; *Ex parte Fitz,* 9 Fed., Cas., 185, involving locomotive engines; *McComber vs. Parker,* 14 Pick. (Mass.), 497, 505, concerned a pledge of bricks as they were made and held in a brickyard; *Bank vs. Harkness,* 42 W. Va., 156, 167, 24 S. E., 548, 32 L. R. A., 408, had relation to 1800 barrels of oil in a tank. *Nevan vs. Roup,* 8 Iowa, 207, 211, a pledge of oats contained in rail pens on the lands on which the grain was grown and threshed; *Jewett vs. Warren,* 12 Mass, 300, 301, 7 Am. Dec., 74, a pledge of logs within a boom.

There is also to be added the weight and effect of the custom respecting the pledge of whiskey deposited

in distillery warehouses. The averments in this behalf are set out in the answer and cross-petition and of course so far as well pleaded are admitted by the demurrer. They are to the effect that these transactions were had in accordance with a custom of trade of more than 40 years' standing, extending throughout the country; that under the custom, distillers, bankers, brokers and dealers in whiskey have during that time treated warehouse documents like these as giving constructive possession of the barrels of whiskey and as conveying an interest in the whiskey according to the nature of the transaction; and that the receipts have been treated as transferring, through indorsement, the rights of the original holders of the whiskey described in them. We cannot under the pleadings accept the suggestion that this custom rests on, or is affected by a statute of the state of Kentucky. In *Gibson vs. Stevens*, 49 U. S., 384, 388 (12 L. Ed., 1123), Chief Justice Taney, when speaking of instruments which were regarded by the court as transferring the legal title and constructive possession of certain flour and pork held in warehouses in Indiana, said of the course of trade:

> 'It has existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood; and it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean. For if, by any decision of this court, doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations, to the injury of all connected with it. * * *'

Furthermore, we must test the intent and effect of these warehouse documents as we should if the suit were between Rohrer and Pattison. As Judge Knappen said in *Re Cincinnati Iron Store Company, supra,* (167 Fed., 492, 93 C. C. A., 128):

> 'A change of possession to the extent of furnishing notice to third persons becomes immaterial, as no rights of such persons have intervened.'

It is to be observed, too, that in *Hunt vs. Bode* the controversy was between the pledgee and the assignee in insolvency of the pledgor; and although a creditor of the assignor prosecuted the case to the Supreme Court, he failed. And in *Hurley vs. Atchison, Topeka & Sante Fe Ry. Co., supra,* it was held (page 134 of 213 U. S., page 469 of 29 Sup. Ct., 53 L. Ed., 729):

> 'The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings.'

See, also, *Wilson vs. Leslie,* 20 Ohio, 161, 166; *York Mfg. Co. vs. Cassell,* 201 U. S., 344, 351, 20 Sup. Ct. 481, 50 L. Ed., 782; *Security Warehousing Co. vs. Hand, supra,* 206 U. S., 424, 425, 27 Sup. Ct., 720, 51 L. Ed., 1117, 11 Ann. Cas., 789; *Zartman vs. First National Bank,* 216 U. S., 134, 138, 30 Sup. Ct., 368, 54 L. Ed., 418.

We are constrained to hold that, as between Rohrer and Pattison, the effect of the delivery of the warehouse documents was to invest Pattison with constructive possession of the barrels of whiskey described in the receipts. The warehouse documents contain the substantial elements of well-understood warehouse receipts,

and no question is made as to their form. It is clear that Rohrer intended to deliver, and Pattison understood that he was to acquire constructive possession of the barrels of whiskey. This mutual purpose ought to be carried out if it can be. According to the present record, the transactions were entered into in good faith to secure loans of money then made. The descriptions of the warehouses by their numbers and of the barrels containing the whiskey dealt with are specific and furnish accurate means of identification. The barrels bear serial numbers, and we have seen that the act provides that:

> 'No two or more casks or packages, warehoused at the same distillery, shall be marked with the same number.'

We conclude on this record that the action of Rohrer was an appropriation of these barrels of whiskey to the purpose of securing Pattison and Pattison alone in respect of moneys then advanced by him. It results that if we are in error in our belief that constructive possession was given, at least an equitable lien on the whiskey was created. As the present learned Chief Justice, when speaking of certain municipal bonds, said in *Walker vs. Brown*, 165 U. S., 654, 666, 17 Sup. Ct., 453, 457 (41 L. Ed., 865):

> 'To dedicate property to a particular purpose, to provide that a specific creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien.'

See, also, *Fourth Street Bank vs. Yardley*, 165 U. S., 634, 17 Sup. Ct., 439, 41 L. Ed., 855; *Gardner vs. National City Bank*, 39 Ohio St., 600, 604; *Hurley vs.*

Atchison, Topeka & Santa Fe Ry., supra, 213 U. S., 134, 29 Sup. Ct., 466, 53 L. Ed., 729; *Bank vs. Day,* 150 Iowa, 696, 699, 700, 130 N. W., 800.

It must be remembered that we are concerned here with only the 210 barrels of whiskey remaining in the distillery. As between Rohrer and Pattison, could Rohrer be heard to say that he did not pledge this whiskey, or at least that he did not create an equitable lien upon it? We think not. We have seen that the trustees stand no better than the bankrupt.

Furthermore, instruments similar to those now in issue have been recently upheld in well considered decisions. In *Taney vs. Penn Nat. Bank,* 187, Fed., 689, 702, 109 C. C. A., 437, 450 (C. C. A. 3rd Circ.), Judge Gray cogently discussed the question of the sale of whiskey stored in distillery warehouses. A pledge was also involved and both court and counsel treated the subject of sale as embracing all material questions of pledge. We have purposely refrained from discussing sales. The question does not arise; and we are told in the argument that such an issue is to be presented to the court later. In the course of his opinion Judge Gray said:

> 'The relation between the distiller and the officers of the government in custody of his whiskey is *sui generis.* It is prescribed by law and is not contractual. But a situation is thereby created, as above described, which in our opinion brings both of the cases before us within what we think is the well-settled rule of law in Pennsylvania, permitting under certain circumstances a valid sale of personal property, as against creditors, to be made in the absence of physical delivery of the property sold.'

The case below is reported under the name *In re Miller Pure Rye Distilling Co.* (D. C.), 176 Fed., 606. Judge McPherson there reached the same conclusion.

Merchants' National Bank of Baltimore vs. Roxbury Distilling Company, 196 Fed., 76, was brought in the Circuit Court of the United States for the District of Maryland, and decided by Mr. John Hinkley, Special Master. Distillery warehouse receipts given in pledge were sustained. A statute of Maryland provides that all warehouse receipts issued by a United States distillery warehouse shall be governed by and be subject to the state act as fully as are the warehouse receipts of any warehouseman. Irrespective of the statute, the master said:

> 'It seems clear to me that there is adequate reason for recognizing the validity of distillery warehouse receipts which has been given to them by long course of dealing by the traders and the banks, and that this contention should prevail. It is a growth and development of the doctrine of constructive or symbolical delivery which I have attempted to trace in this opinion, and of the underlying principle that the courts will recognize as constructive delivery that form of delivery which the character and situation of the goods imperatively requires.'

He reached the conclusion that the receipts 'are valid not only inter parties or against solvent distillers, but absolutely as vesting title in such purchasers or liens in favor of such pledgees, against subsequent creditors.' His report was on March 25, 1912, sustained by Judge Morris, who said:

> 'But independent of the special enactment of Maryland with regard to distillery warehouses, I

am in full accord with the special master in his conclusion that because of the peculiar situation of the distilled spirits stored in a bonded distillery warehouse, there is by the transfer effected by the warehouse certificate as full a delivery of the goods as is commerically possible under the special circumstances attending distilled spirits stored in the bonded distillery warehouses of the United States. * * *

It appears that this constructive delivery is commonly made use of by those dealing in whiskey, and money is loaned on pledges of the certificates by banks and others in sums of great magnitude. This is so because whiskey usually must be kept in the distillery warehouse five years to mature, and in no other way could the necessary money be raised and the whiskey itself be commercially dealt with except by the use of these warehouse certificates representing the whiskey.'

The order and decree below must be reversed, and the case remanded with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion."